

Haji Bibi Part 1

Haji Bibi Case

THE BOMBAY LAW REPORTER

ORIGINAL CIVIL.

Before Mr. Justice Russell

HAJI BIBI

v.

H.H. SIR SULTAN MOHAMED SHAH,

THE AGA KHAN *

The Aga Khan has absolute property over the offerings made to him - Members of the Aga Khan's family not jointly entitled to such offerings - Succession to the estate of the Aga Khan is not joint - Khoja are Shiah Imami Ismailis and not Asnasharis - History of the Aga Khan family - History of Shia Imami Ismailis - Judge entitled to exclude the public from the court or to let the evidence likely to arouse religious or political disquietude be published.

The offerings made to the Aga Khan for the time being by his followers are intended by them to be for his own personal use and benefit and are his absolute property, and such offerings are made to him from a feeling of veneration and reverence, the object of them being that while on the one hand he is to take them for himself, they on the other, are to reap the benefit of them whether it be of a temporal or a spiritual character. They are not made for the benefit of the members of the Aga Khan's family. The members of the family have no right to be maintained by the Aga Khan nor are they in any way entitled to the offerings received by the Aga Khan for the time being.

There is no joint succession to the estate of the Aga Khan.

The ancestors of the Khojas of Bombay were originally converted to the Shiah Imami Ismaili faith by Pir Sadurudin, a missionary of the time of Imam Salamshah, and the Aga Khan is not an Asnashari but is the hereditary chief and the Hazar Imam of the Shiah Imami Ismailis. The faith of the Khojas who follow the Aga Khan is, and always has been, the Shia Imami Ismailis faith. They are not and ever were Asnasharis.

In determining whether the performance of any particular rite promotes any particular religion, and benefits the members of the denomination or body who profess it, the secular Court must act upon the evidence of the belief of the members of the community concerned.

History of the belief of the Shia Imami Ismailis traced.

realpatidar.com



Real Patidar Library

This book/literature/article/material may be used for research, teaching, and private study purposes. Any substantial or systematic reproduction, redistribution, reselling, loan, sub-licensing, systematic supply, or distribution

in any form to anyone is expressly forbidden.

The library does not give any warranty express or implied or make any representation that the contents will be complete or accurate or up to date. The library shall not be liable for any loss, actions, claims, proceedings, demand, or costs or damages whatsoever or howsoever caused arising directly or indirectly in connection with or arising out of the use of this material.

Full terms and conditions of use: <http://www.realpatidar.com>

About Real Patidar books

Real Patidar's mission is to organize the information on Satpanth religion, which is a Nizari Ismaili sect of Shia branch of Islam, and to make it universally accessible and useful. Real Patidar Books helps readers discover the material on Satpanth online while helping authors and researchers in their studies. You can know more by visiting <http://www.realpatidar.com>

Haji Bibi Part 1

Haji Bibi Case

THE BOMBAY LAW REPORTER ORIGINAL CIVIL.

Source: <http://www.ismaili.net/Source/hbib1.html>

Downloaded on: 09-Aug-2012 04:17

Before Mr. Justice Russell

HAJI BIBI

v.

**H.H. SIR SULTAN MOHAMED SHAH,
THE AGA KHAN ***

The Aga Khan has absolute property over the offerings made to him - Members of the Aga Khan's family not jointly entitled to such offerings - Succession to the estate of the Aga Khan is not joint - Khoja are Shiah Imami Ismailis and not Asnasharis - History of the Aga Khan family - History of Shia Imami Ismailis - Judge entitled to exclude the public from the court or to let the evidence likely to arouse religious or political disquietude be published.

The offerings made to the Aga Khan for the time being by his followers are intended by them to be for his own personal use and benefit and are his absolute property, and such offerings are made to him from a feeling of veneration and reverence, the object of them being that while on the one hand he is to take them for himself, they on the other, are to reap the benefit of them whether it be of a temporal or a spiritual character. They are not made for the benefit of the members of the Aga Khan's family. The members of the family have no right to be maintained by the Aga Khan nor are they in any way entitled to the offerings received by the Aga Khan for the time being.

There is no joint succession to the estate of the Aga Khan.

The ancestors of the Khojas of Bombay were originally converted to the Shiah Imami Ismaili faith by Pir Sadurudin, a missionary of the time of Imam Salamshah, and the Aga Khan is not an Asnashari but is the hereditary chief and the Hazar Imam of the Shiah Imami Ismailis. The faith of the Khojas who follow the Aga Khan is, and always has been, the Shia Imami Ismailis faith. They are not and ever were Asnasharis.

In determining whether the performance of any particular rite promotes any particular religion, and benefits the members of the denomination or body who profess it, the secular Court must act upon the evidence of the belief of the members of the community concerned.

History of the belief of the Shia Imami Ismailis traced.

realpatidar.com

You can resize and move this box in any PDF Application like Adobe Acrobat Reader.

For page numbers, see the page footer.
Page numbers are in 'Page x of y' format
For Reference See Pages: 1.

* *Suit No. 729 of 1905.*

realpatidar.com

History of the Aga Khan family narrated.

When the evidence in any case if published in the daily papers is likely to arouse religious or political disquietude, the Judge is entitled to exclude the general body of the public and to decline to let the evidence be published.

THIS suit was brought against His Highness Sir Sultan Mohamed Shah, the Aga Khan, and some of his relations by one Haji Bibi, widowed daughter of Jungi Shah, an uncle of Sir Sultan Mohamed Shah, claiming as one of the daughters of Jungi Shah, a share in the estate left by the first Aga Khan, and for that purpose preying to set aside a certain release which had been passed by one Shamsudin Shah, the administrator of the estate of Jungi Shah, releasing all the claims of that estate against Sir Sultan Mohamed Shah.

The plaintiff and defendant 2 and defendants 9 to 14, who supported the plaintiff's case, contended *inter alia*:

1. That the voluntary offerings made by the Khoja followers of the Aga Khan were made not for the personal use of the Aga Khan alone, but for and on behalf of the members of the Aga Khan family.
2. That the Aga Khan for the time being was bound, as a matter of right to maintain all his relations from out of such offerings, as had been done by the first and the second Aga Khans.
3. That the Khoja followers of the Aga Khan were from the date of their conversion into Mahomedanism, and had always been Shia Asnasharis by faith and not Shia Imami Ismailis.
4. That the release executed by the administrator of the estate of Jungi Shah was fraudulent and collusive and was a sham transaction never intended to be acted upon.

Mr. *Bahadurji*, the Honourable Mr. *Setalvad* and Mr. *Dessai*, for the plaintiff.

Mr. *Inverarity*, Mr. *Lowndes* and Mr. *Raikes*, for His Highness the Aga Khan.

The Honourable Mr. *Scott*, Mr. *Strangman* and subsequently Mr. *Branson* and Mr. *Jinnah*, for Shamsudin Shah.

Mr. *Bahadurji* and Mr. *Desai*, for defendant 2.

Mr. *Robertson* and Mr. *Jardine*, for defendant 3.

Mr. *Branson* and Mr. *Viccaji* and subsequently Mr. *Jaffer Rahimtulla*, for defendants 4 and 6.

Mr. *Padsha* and Mr. *Lalkaka*, for defendants 7 and 8.

The Honourable Mr. *Setalvad*, with Mr. *Davar* and Mr. *Desai*, for defendants 9 to 14.

Mr. Justice Russell, owing to certain questions being put to His Highness the Aga Khan in the course of his cross-examination, ordered the Court to be cleared and

realpatidar.com

directed that the evidence must not be published in the daily papers. The counsel for the plaintiff thereupon submitted that he was instructed not to proceed with the case if it was not fully reported. He and the counsel for defendants 9 to 14 withdrew from the case. ...Although the plaintiff's counsel and solicitors...the Court has still power, on the authority of Mr. Gowdappa (1) to decide the case on the merits and evidence that has been adduced. I submit the Court.....to dismiss the suit under S.102, Civil procedure Code, on the ground that some of the parties do not appear, and it was for this reason that I considered necessary to complete my evidence. The plaintiff's counsel withdrew, not because any evidence was rejected, but because certain questions and answers were not allowed to be published in newspapers. In an oriental country it is advisable, if possible, to avoid matter which would give offence to other religious sects. In England it is recognized that one should not discuss whether one particular religion is truer than any other faith. The province of a Court of law in deciding cases where questions of religion come in is confined merely to finding out what the beliefs and doctrines of a particular community are: See *Jamshed v. Soonabai (2)*; *O'Hanlong v. Logue (3)*. The Court has not to decide the truth or otherwise of a particular religion, but whether a particular community holds certain beliefs.

The plaint charges the Aga Khan with fraud in reference to the release, but the plaintiff closed her evidence without supporting the charge. In her examination-in-chief no effort was directed to show that there was any fraud whatsoever in the execution of the release. We hear of the release as a sham and fraudulent document for the first time in the plaint four years after it had been executed and four years after the plaintiff had known about it. It was clearly not a sham transaction because under the document Rs. 40,000 were paid and three bungalows worth one lakh of rupees were conveyed to Jungi Shah's estate. The arrangement was a fair one and was due to the quixotic generosity on the part of the Aga Khan.

It is alleged that the Aga Khan family is a joint and an undivided family. The plaintiff at one time said that the first Aga Khan's brothers and sisters and their descendants were all members of the joint and undivided family and were all entitled to a share in the estate. Thus there were 200 people entitled to a share in the property. She abandoned that case seeing that Jungi Shah would thus be entitled to very little and subsequently said that the joint family was confined to nine heirs and heiresses. This is quite absurd.

The suggestion that the Aga Khan instigated the of Hassam Shah and Jangi Shah was not made until near after the suit was filed. This allegation was absolutely immaterial to the case and was brought to increase the pressure which the plaintiff wished to put upon the Aga Khan to settle the case.

As to the question whether offerings made to the Aga Khan are for his sole use and benefit or are made on behalf of the members of the family, the first point the Court has to consider is to enquire why they are made. We have got over three hundred witnesses who have sworn that they are made in consequence of the injunction in the religious books known as Ginans. The offerings are collected at various Jamatkhanas and sent to the Hazar Imam. The plaintiff's case once was that the payments were made for the benefit of the relations of the Hazar Imam and that these payments to the relations had been mixed up with the Imam's money and therefore they were entitled to the money which were mixed up with the Imam's money. Subsequently a different case was set up and it was said that

there was no Hazar Imam. It was also alleged that there were passages in the Ginans which imposed upon the followers the duty that they should make payments to the members of the family of the Ali, and that the meaning of the word 'Ali' was progeny. This allegation was subsequently dropped when a witness pointed out that the Ginans themselves explained that the 'Ali' of Ali meant the Imam on the Gadi. When it suited the plaintiff and her supporters they adopted Ginans and Imam, and relied on the Ginans as the foundation of their claim that the offerings were for the benefit of the family. They now say before this Court that Ginans are a recent introduction of the Aga Khan and have not been heard of for ages. There is not a word suggested during the time that various commissions in different countries were going on that the Doowa and the Ginans were recent inventions. It is quite clear from the evidence taken at Mahuva that witnesses never suggested that Hasan Ali was Asnashari. The seceders who signed the advertisement in 1901 were ostensibly Ismailis but were really Asnasharis for great many years. The Khojas were always Ismailis, although some members, who ostensibly followed that faith were Asnasharis at heart, and when they got sufficient followers to form a community of their own they openly seceded. The Aga Khan's followers do not visit any members of his family. They never kiss their hands. The case that has been set up here is a complete invention in order to get rid of the effect of the evidence taken on commission. I think your Lordship will be of opinion that the commissions were ably conducted by Mr. Moos, who proved a most excellent cross-examiner and managed the whole of our commissions in the best possible manner.

(RUSSELL J. - I quite agree with you. I do not think it could have been better done.)

In the whole course of my thirty-eight years' experience at the bar here, I have never received better assistance than what I have had from Mr. Moos in this case. He knows the case from top to bottom and has always had at his finger's ends any information that was required.

We have for the first time the story told of the offerings being made to the lady members of the family and their being sent to the Dafterkhana where all moneys were sent. This was a bold invention and absolutely contradicted by the whole of the evidence and by the plaintiff.

The passage referred to in the Koran has nothing to do with offerings. It is quite impossible that it should be so for the very good reason that when the Koran was revealed there were no Imams. We were told that the plaintiff's case was that it was in consequence of the injunctions in the Koran that the offerings were made to the members of the family. The passage in the Koran refers to the booty or spoils taken in war. Not one of the commentators quoted by Sale make the suggestions that is now made. The Privy Council has held that the Courts would not put their own construction on the Koran in opposition to the old commentators: See *Aga Mohamed Jaffer Binadanim v. Koolson Beebee* (1).

The making of the offerings to the Hazar Imam is part of the religion of Ismailis and it is in consequence of that faith the offerings were made to Imam not as trustee for the members of the family, but to him personally for the purpose of getting prosperity in this world and paradise in the next.

Your Lordship has to find what the Ismaili faith is. We submit, in this case it is proved beyond doubt that the religious faith of the Khoja Shia Imami Ismailis is

found upon injunctions given to them by Pir Sadrudin and Hassan Kabirudin and contained in their ancient religious books, and Ginans. We have in evidence that there are similar religious books which give injunctions to the same effect as the Ginan for the other followers of the Aga Khan whose ancestors had been converted to the Imami Ismaili faith by different missionaries and at different times.

We are entitled to separate set of costs for each set of defendant. I ask for decrees of costs against the plaintiff, the second defendants, and defendants 9 to 14. *Cur. Adv. Vult.*

RUSSELL J. - Although in this suit no less than 128 issues have been raised, and the suit itself has attained the distinction of having taken up the longest time on record in these Courts, the real questions at issue are of a simple character, and are not more than two in number. The first of these questions is: Are the offerings made by the Khoja community of Bombay to the Aga Khan, made to him for his sole use and benefit or for the use and benefit of certain members of his family?

(2) Was the release of the 11th September 1901 made between Shamsudin, defendant 5, in his own right and as administrator of the estate of Jungi Shah of the one part, and defendant 1 of the other, a sham transaction or collusive and fraudulent, and is it binding upon the plaintiff?

The plaintiff is the widow of Aga Moochool Shah, who was a son of Jallal Shah, who was a son of Hassan Ali, the first Aga Khan (hereinafter referred to as H.A.). The 1st defendant is the present Aga Khan, the 3rd son of Ali Shah, the second Aga Khan (hereinafter referred to as A.S.). The 2nd defendant is Bibi Saheb, widow of Suleman Khan and one of the daughters of Hassan Ali. The 3rd defendant is Bibi Shamsool Mooluk, widow of Ali Shah, otherwise called Lady Ali Shah. The 4th defendant is Khudijah Bibi, widow and 2nd wife of Jungi Shah, another son of Hassan Ali. The 5th defendant is Aga Shamsudin Shah (hereinafter called Samsudin) 2nd son of Jungi Shah aforesaid. The 6th defendant Shahzadi Begum, wife of defendant 1, is one of the daughters of Jungi Shah by the said Khudijah Bibi and a sister of the plaintiff, and the said Shamsudin. The 7th defendant is Aga Sharookh Shah, a son of Akbar Shah, who was one of the sons of Hassan Ali. The 8th defendant is Aga Farookh Shah, another son of the said Akbar Shah. The 9th defendant is Aga Coochick Shah (hereinafter called Coochick), the brother of Moochool Shah and Shah Bibi, and son of Jallal Shah. Coochick married first a daughter of Shabuddin Shah and after her death her sister. The 10th defendant is Shah Bibi, the widow of Nooroodin Shah, the second son of the said Ali Shah and brother of defendant 1. The 11th defendant is Malik Taj Begum, sister of Shah Bibi, wife of Zainulabedin Shah and daughter of Jallal Shah. Defendants 12 to 14 inclusive are the two sons and daughter respectively of Moochool Shah by the plaintiff. See pedigree annexed to the plaint and the one put in by defendant 1 which must both be taken as part of this judgment.

The contending parties in the suit are on the one hand the plaintiff, defendant 2 and defendants 9 to 14; and on the other hand defendant 1 and defendants 3 to 8.

The material paragraphs of the plaint are paras 1, 2, 13, 14, 15, 17, 18, 23, 24, 34, 36, and 55, and of the prayers (c), (g), (j) and (k). I read them at length.

1. That Hassan Ali Shah Alias Mohamed Hassan Hoosaini, late of Bombay but less recently of British Sind, and formerly of Kerman in Persia, commonly called the 1st Aga Khan, Hereditary Chief and unrevealed Imam or spiritual Head of the

sect of Mohamedan known as the Shiah Imami Ismailis or Ismaili Shiahs. Hereditary Imam of the community known as the Khojas of Bombay and elsewhere in India and other countries and titular Head of his own family, deceased, was or claimed to be the direct lineal descendant of Imam Ismail, son of one Jaffer Sadiq, 6th Imam of the Shiahs through the Fatemaid Khalifs of Cairo.

2. That as such spiritual Head as aforesaid, the 1st Aga Khan (and each of his said ancestors since A.D. 1770 and probably for several centuries earlier) was the recipient of large, valuable and frequent offerings and presents from the Khojas aforesaid and also from Ismaili Shias. He also received an allowance of Rs.3,000 per month from the Government of India. All the said emoluments, or the investments now representing the same, form as the plaintiff contends, parts of the entire estate of the said family wherein she claims to have rights as hereinafter stated.

13. That during and since the lifetime and regime of the said 1st Aga Khan and up to the instances of breach hereinafter stated, every male member of the family on attaining majority, and every female member thereof on attaining majority or marrying, has resided rent free in some house or houses pertaining to the said family estate and through the Titular Head and Manager for the time being of the said family, and out of the funds of the said family estate has received personal monthly allowances and the salaries of servants, and wedding presents in the event of marriage, and has also been provided with food, servants, carriages, horses, furniture and other requisites and comforts.

14. That the said residence, allowances, requisites, and comforts were so enjoyed by the same members of the said family as aforesaid by virtue of the fact that they were heirs and heiresses jointly entitled as of indefeasible right under the Mohamedan Law of Inheritance whereby the said Shiahs and the said family as belonging to that sect are governed, to definite parts of shares of and in the said family estate.

15. That, nevertheless, the said residence, allowances, requisites and comforts are not and never have been given to and received by the said several members of the said family as the equivalent or in the stead of or as wholly representing but only as a portion or on account of what they have been, are, or would be entitled to receive as heirs according to their said respective parts or Shares under the said Law of Inheritance of and in the said family estate, inasmuch as the said several parts or shares are and always have been undivided and have never been actually ascertained and declared nor has the said family estate ever been partitioned by metes and bounds and distributed or allotted amongst and to the several heirs and heiresses entitled thereto in accordance with any such ascertainment or declaration.

17. That the said 1st Aga Khan died in 1881 at Bombay leaving the following heirs and heiresses to wit - three widows, the said Serve Khan Begum, the said Meriam Khanum, and the said Haji Baig; three sons, the said Ali Shah, the said Aga Jangi Shah and the said Akbar Shah, and three daughters the Said Bibi Saheb, the said Bibi Gowhar and the said Bibi Tajmah.

18. That the death of the said 1st Aga Khan as aforesaid, all his said nine heirs and heiresses jointly succeeded to his estate according to their respective shares therein under the law, but that one of the said heirs, to wit, the said Ali Shah, also succeeded him as titular Head of the family and as Manager thereof and of the

estates pertaining thereto, and became known as the 2nd Aga Khan, and continued as such until his death hereinafter stated.

23. That after the death of the said 1st Aga Khan as aforesaid, his said three widows, three sons and three daughters (named in para 17) and their issue continued to live together as an undivided joint family, being jointly in enjoyment of the entire family estate according to their respective undivided shares therein, residing in divers houses pertaining to the said estate, and receiving payments out of the funds thereof in their character as heirs and heiresses, and after the death of any of the said widows, sons and daughters, his or her heirs continued to live as an undivided joint family together with the survivor and their issue and jointly to enjoy the said family estate.

24. That according to the said Mohamedan Law of Inheritance whereby the said family are governed as aforesaid, each of the said three widows named in para 17 became entitled to an undivided 24th share in the said entire family estate, each of the said three sons became entitled to seven undivided 26th share therein and each of the said daughters became entitled to seven undivided 72nd share therein.

34. That in consequence of various demises and joint successions above set forth, the plaintiff became and is entitled to 7 undivided 144th share in the entire estate of the said family.

36. That by an Indenture dated the 11th day of September 1901 made between the said Aga Shamsudin Shah defendant No. 5, in his own right and as administrator of the estate of the said Aga Jungi Shah deceased of the one part and the said defendant No. 1 of the other part, and registered at Bombay, reciting the death of the said 1st Aga Khan, leaving him surviving the widows, sons and daughters already named as his only heirs and legal representatives according to Mohamedan Law, and also leaving moveable and immoveable properties at Bombay, Poona, Bangalore, and Karachi, and reciting that immediately after the death of the said 1st Aga Khan the said 2nd Aga Khan entered into possession of the properties described in the Schedule A thereunder written, being the immoveable properties belonging to the estate of the said 1st Aga Khan deceased, with the exception of the property described in the Schedule B thereunder written, and managed the same on his own behalf, and himself exclusively enjoyed the rents and profits thereof to the exclusion of the other heirs of the said 1st Aga Khan deceased up to the time of his death, and that the said Aga Jungi entered into possession of the said property described in the said Schedule B and exclusively enjoyed the rents, profits and income thereof upto the time of his death, and reciting the death of the said 2nd Aga Khan leaving the widow and son already named as his only heirs and legal representatives according to Mohamedan Law, and reciting that at the death of the 2nd Aga Khan, all his properties both moveable and immoveable including the properties described in the said Schedule A came into possession of the said Bibi Shamsool Moolak defendant No. 3, and was managed by her for and on behalf of the said defendant No. 1 to the exclusion of the other heirs of the said 1st Aga Khan and reciting that in the year 1893 the said defendant No. 1 entered into possession on his own behalf of all the said last mentioned properties, and reciting that the properties situate in Bombay and described in the said Schedule A were in the year 1893 transferred in the books of the Collector of Bombay and of the Municipality of Bombay into the name of the said defendant No. 1, and reciting that since the death of the said 2nd Aga

Khan the said defendant No. 1 had been in sole and exclusive enjoyment of the rents, and profits and income of the said properties described in the said Schedule A, as also of the other properties left by the said 1st Aga Khan and the said 2nd Aga Khan, save as aforesaid to the exclusion of the other heirs of the said 1st Aga Khan, and reciting the death of the said Bibi Tajmah and of the said Bibi Maryum each leaving the said Aga Jungi Shah as one of her heirs and legal representatives according to Mohamedan Law, and reciting that the said Aga Jungi Shah (as the said defendant No. 1 did thereby admit and acknowledge) remained in possession of the said property described in the said Schedule B ever since the death of the said 1st Aga Khan and himself enjoyed the rents and profits thereof to the exclusion of all other heirs of the said 1st Aga Khan up to the time of his death, and reciting that the said Aga Shamsudin defendant No. 5 (as the said defendant No. 1 did thereby admit and acknowledge) entered into possession of the said property described in the said Schedule B on the death of the said Aga Jungi Shah as aforesaid, and had been himself enjoying the rents and profits and income thereof to the exclusion of all of the heirs of the said 1st Aga Khan deceased, and reciting that the said Aga Shamsudin Shah defendant No. 5 as the sole surviving son and as one of the heirs of the said Aga Jungi Shah deceased applied for and obtained Letters of Administration to the estate of the said Aga Jungi Shah deceased from this Honourable Court on the 28th day of August 1901, and reciting that the said defendant No. 1 and the said 2nd Aga Khan deceased having been in absolute possession and enjoyment of the said properties described in the said Schedule A since the death of said 1st Aga Khan, the said defendant No. 1 did contend that the said Aga Jungi Shah had not for a long time before his death had any claim, and his estate had then no claims whatsoever in the said properties or against the estate of the said 1st Aga Khan, because the said Aga Jungi Shah's right to a share as an heir of the said 1st Aga Khan had long prior to his death been barred by the law of Limitation, and reciting that the said Aga Shamsudin Shah, defendant No. 5 as such administrator, as aforesaid and in his own right did thereby admit and acknowledge correctness of the parts therein before recited and of the aforesaid contention, and did admit and acknowledge that the claim, if any, of the said Aga Jungi Shah and after his death of his estate to share in the estate of the said 1st Aga Khan deceased had at the death of the said Aga Jungi Shah been and was barred by Limitation, and that the said estate of the said Aga Jungi Shah was not in any way entitled to any portion of the said properties described in the said Schedule A or in the estate of the said 1st Aga Khan, and reciting the said Aga Shamsudin Shah as such Administrator as aforesaid and in his own right did thereby further admit and acknowledge, that all and singular the payments and allowances, which were made and the food and provisions which were from time to time supplied, and the residence in some of the houses in the properties situate in Bombay firstly, secondly, thirdly and fourthly described in the said Schedule A and the properties situate in Poona firstly and secondly described as the Poona properties in the said Schedule A, which was permitted by the said 2nd Aga Khan during his lifetime, and after his death by the said Bibi Shamsool Moolak defendant No. 3 as mother and guardian of the said defendant No. 1 and that the other similar payments, food, provisions and residence, which were still being made, supplied and permitted by the said defendant No. 1 himself, since he came of age to the different members of the family of the said 1st Aga Khan, including the said Aga Jungi Shah deceased and his children and descendants including therein the said Aga Shamsudin Shah defendant No. 5, had been and were being made, suffered and permitted respectively, as a matter of grace and favour, and not as a matter of right or by reason of any custom or usage or for any other cause or any other ground

whatever, but was entirely dependent on the will of the said defendant No. 1, and that the same could not and would not be claimed as a matter of right, and reciting that with a view to prevent any disputes in future between the parties thereto, and out of family affection but without the said defendant No. 1 in any way admitting the right or claim of the said Aga Shamsudin Shah defendant No. 5, as such Administrator as aforesaid, or in his own right, or of the estate of the said Aga Jungi Shah deceased, or of any of the other sons or daughters of the said 1st Aga Khan to any claim whatever in the estate of the said 1st Aga Khan or any other right or claim, if any, or howsoever arising, and without prejudice to all the rights and contentions of the said defendant No. 1 that all such claims, if any, had long since become barred by Limitation, and which rights and contentions were thereby expressly reserved, the said defendant had determined to grant and convey unto the said Aga Shamsudin defendant No. 5 as such administrator as aforesaid, the property described in the Schedule C thereto annexed being a portion of the property thirdly described in the said Schedule A and to pay to him a sum of Rs. 40,000, on or about the execution of these presents, which conveyance and payment was given and made by the said defendant No. 1 voluntarily and not by reason of any obligation binding on him; and reciting that the said Aga Shamsudin Shah defendant No. 5 as such administrator as aforesaid and in his own right, in consideration of such conveyance and payment and of the said defendant No. 1 releasing all his right, title and interest (if any) to or in the said property described in the said Schedule B was willing to execute in favour of the said defendant No. 1 the release thereafter contained, and reciting that for the purposes of stamp duty and value of the said property described in the said Schedule C was taken at Rs. 100,000. It was witnessed that to effectuate the said determination and in consideration of such release as was therein after contained, the said defendant No. 1 did thereby grant and convey unto the said Aga Shamsudin Shah defendant No. 5 as such administrator as aforesaid and his heirs, executors, administrators and assigns, all that piece or parcel of land or ground more particularly described in the said Schedule C being a portion of the property, thirdly described in the said Schedule A together with all rights and appurtenances thereto belonging and all the estate and interest of the said defendant No. 1 therein, to have and to hold the same unto and to the use of the said Aga Shamsudin Shah defendant no. 5 as such administrator as aforesaid, his executors, administrators, and assigns forever, subject as therein mentioned, and it was further witnessed that for the consideration aforesaid and in consideration of the sum of Rs. 40,000 paid by the said defendant No. 1 to the said Aga Shamsudin Shah defendant No. 5 as such administrator as aforesaid, the said Aga Shamsudin Shah defendant No. 5 as such administrator as aforesaid and also in his own right as one of the heirs of the said Aga Jungi Shah deceased did thereby release or discharge the said defendant No. 1 and his estate and effects and the estate and effects of the said 1st and 2nd Aga Khans, including the properties described in the said Schedule save that portion of the property thirdly described in the said Schedule A as was thereby conveyed to the said Aga Shamsudin Shah defendant No. 5 of and from all actions, claims and demands, whatsoever, as therein mentioned, it being distinctly agreed that the said release was to operate as a complete discharge in respect of any and every possible right, claim or demand of the estate of the said Aga Jungi Shah deceased, whether past, present, derivative or contingent to upon, and against the estates of the said 1st and 2nd Aga Khans and against defendant No. 1 and his estate, and it was further witnessed that in consideration of the premises the said defendant No. 1 did thereby release, convey and assure unto the said Aga Shamsudin Shah defendant No. 5 his heirs, executors, and administrators all the right, title and interest of the said defendant No. 1 (if any), of, in and to all the

properties described in the said Schedule B with their appurtenances, to have and to hold the same unto and to the use of the said Aga Shamsudin Shah defendant No. 5 his heirs, executors, administrators and assigns absolutely.

55. Plaintiff is informed by the said Aga Coochik Shah the defendant No. 9 above named, the said Shah Bibi the defendant No. 10 above named, and the said Malik Taj Begum the defendant No. 11 above named, who together with the said Aga Moochool Shah deceased were all alive at the time of the death of the said 1st Aga Khan as aforesaid, and also by the said Aga Abdul Sumad Shah the defendant No. 12 above named, the said Aga Jalal Shah the defendant No. 13 above named, and the said Shah Begum the defendant No. 14 above named, and believes that they also claim to be entitled as joint heirs to share in the said entire estate and to maintenance out of the said estate in virtue of a family custom and usage they set up and that they allege that the said 1st Aga Khan left a will which has been suppressed by the said defendant No. 1 and they accordingly all joined as defendants in this plaint.

Prayers:

(e) That an inquiry may be held under the directions of this Honourable Court to ascertain what the estate of the said 1st Aga Khan consisted of at the time of his death, and which on such death came into the hands of the said second Aga Khan as such Titular Head of the said family and manager of the affairs thereof as aforesaid.

(f) That an account may be taken of all the property immoveable and moveable belonging to the said family at the time of the death of the said second Aga Khan, and which on such death came into the hands of the said defendant No. 1 as such Titular Head and manager as aforesaid, and of all accretions thereto, and of all rents, profits, income, investments and expenditure thereof, and of all dealings therewith by the said defendants No. 1 since that time.

(g) That it may be declared that all accretions to the said family estate since the death of the said 1st Aga Khan formed and still form part of the joint estate of the said family.

(k) That a partition may be effected under the orders and directions of this Honourable Court of the entire estate of the said family, and that the respective shares therein of the several parties to this suit may be ascertained and their respective rights therein declared, and that the share of each of the said parties when ascertained may be allotted to him or her in severalty, and that he or she may be put in the possession thereof.

Written statement of defendants 9 to 14:

3. Those defendants say that all the members of family of Shah Hasan Ali the 1st Aga Khan including these defendants are jointly entitled to the offerings received from time to time and to the properties acquired by means of such offerings. These defendants say that instead of dividing the said offerings and properties among the persons so entitled to them a custom has grown up in the family ever since the time of the 1st Aga Khan to the effect that the Titular Head for the time being keeps charge of and manages all offerings and makes suitable allowances to the other members, the males on attaining majority and the females on getting married or attaining majority, besides providing for them residence, servant's

salaries, horses and carriages, food and all requisites and wedding and funeral expenses out of the family properties and offerings. These defendants used to receive such allowances, etc. as shown in Schedule No. I hereto annexed, but the same have been considerably reduced from the respective dates therein shown.

Defendant 1's written statement sets forth a large number of defences, the nature of which, however, may be sufficiently gathered from the first 125 issues.

The 5th defendant Shamsudin, in his written statement, sets forth the circumstances under which the alleged release of the 11th September 1901 came to be passed.

The 7th and 8th defendants *inter alia* say that their father Akbar Shah appropriated to himself certain properties belonging to the said Hassan Ali which he treated as his own exclusive property, and that their father never claimed any more property against the estate of the said Hassan Ali nor any of the allowances, and they say they have no right to any of the properties left by the said Hassan Ali.

The defendants 9 to 14 say *inter alia* that the offerings received by the successive Aga Khans were received not for their individual benefit, but for the benefit of all the members of the family as shown in the pedigree, Ex. A to the plaint. Para 3 of their written statement sets up the custom they rely upon.

It will be seen that upon the face of the plaint it is difficult, if not impossible, to ascertain the real basis of the plaintiff's claim. The plaintiff claims 7-144 of Hassan Ali's estate, and at the hearing before me it was contended that the parties were governed by Mohamedan law, but the plaint mixes up Mohamedan law with Hindu law in a very confusing way and is hopelessly inconsistent.

Para 17 of the plaint first sets out the nine heirs and heiresses of Hassan Ali, para 14 says that those nine heirs and heiresses jointly succeeded to his estate according to their respective shares according to law. If this is interpreted to be Mohamedan law, there is no such thing as joint succession known to it. Para 23 says that after his death the said 9 heirs and heiresses, named in para 17, and their issue continued to live together as an undivided joint family. The words "continued to live" imply that they lived as an undivided joint family during Hassan Ali's life. In the correspondence, all through H. 16, see pages 22 to 25 of the Appeal Book, it will also be seen that the plaintiff bases her claim as having a joint interest with defendant 1. See also D.H. 6 Edgelow and G's letter, 31st March 1904, on behalf of Coochick to defendant 1. It is therefore very difficult to ascertain from the plaint by what law or legal principle the succession to the estate of Hassan Ali is to be determined, and in my opinion the Mohamedan law of Inheritance and the Hindu law are mixed up in a way which renders it almost impossible to know what those, who drafted the plaint, had in their minds when they drew it. According to the Hindu law of the joint family, the governing principle is not heirship but survivorship, and that I understand those who drafted the plaint had in their minds when they say in para 18 that on the death of the first Aga Khan as aforesaid all his said nine heirs and heiresses jointly succeeded to his estate according to their respective shares therein under the law, meaning I apprehend the Mohamedan law which is referred to before; but then in para 23 they go on to say that after the death of the said first Aga Khan, his said three widows, three sons and three daughters and their issue, continued to live together as an undivided joint family, receiving payments out of the funds thereof in their character as heirs and heiresses. From this I assume that it was intended to say that the Hindu law of the

joint and undivided family was applicable to the case and not the Mohamedan law under which the succession devolves in severalty, and this conclusion of mine is borne out by the plaintiff's evidence in cross-examination, and Mr. Inverarity rightly took the plaintiff in detail through the various members of the alleged joint family, so that she should be making no mistake upon this most important part of the case. I therefore read her cross-examination on this point in extenso on Saturday 15th February 1908. See from page 39, line 28: "I have heard of Mohamed Taki Khan, son of ... etc.," to page 43, line 5, of the printed evidence before me. That the plaintiff, however, discovered afterwards the fatal effect of her evidence is plain, because after she had given the above evidence she abandoned that position and said as follows on Monday 17th February 1908, page 53, line 14: "I wish to say now, etc.," to "answers I have given today," line 25, p. 53. Further para 2 of the plaint admit that there was no new departure from the time of Hassan Ali; the offerings were made to Hassan Ali as the 46th Imam, not as Aga Khan. Offerings are made for many years to the Imams not to Aga Khans. Therefore hundreds of people would be entitled to share in them, and why should Khalilulla's descendants not be so entitled? If, therefore, the case is to be governed by Hindu law, it is obvious that it is impossible upon the record, framed as it is now, for this Court to decree the partition that is sought for, for the simple reason that a large number of persons who are interested in and entitled to share in the property of the joint and undivided family are not on the record, and no application for placing them on the record has been made to me, and this obviously is a fatal defect in the plaintiff's case.

It, undoubtedly, was open to defendant I to raise various preliminary points in this case, but no application was made to me that they should be decided in the first place, the reason for this being, I apprehend, that the advisers of the 1st defendant, seeing the very grave importance of this case to him upon the merits, were unwilling to base their defence upon technical questions of law, but determined to fight the plaintiff and her supporters on the merits.

As Mr. Inverarity put it the position of his client made it quite impossible for him to raise the smallest technical objection to the attacks made upon him. An attack has been made upon him which involves fraud and moral turpitude, and he must have the whole matter thoroughly sifted out in view of the moral effect that such charges would have upon his followers.

I propose now to deal with the first of the two main branches of the case which I have stated above, namely, who is entitled to the offerings made by the followers of the Aga Khan, or in other words whether the members of the family other than the Aga Khan for the time being have any right or title thereto.

The consideration of this question necessitates my setting forth, as shortly as I possibly can, certain facts as to the history of the Aga Khan and the Khojas so far as they are material to this case, and the conclusion I have arrived at as to the faith professed by him and his followers. But before doing so I wish to clear the ground in respect of one matter upon which a mass of evidence has been given and by which a great deal of the time of the Court has been occupied, and that is whether the Aga Khan is an Asnashari. This question arose in this way; when the plaintiff's counsel began to put questions as to this, I could not at first judge whether they were relevant or not. As soon, however, as I ascertained the object with which they were being put, namely with a view to depreciate the position of defendant I in the community, I of my own motion drew Mr. Bahadurji's attention to

paras 1 and 2 of the plaint, and told him that if he wished to give the go-bye to those paras, he must formally amend the plaint. When I did this it was in the expectation, and may say in the hope, that objection would be raised on behalf of defendant 1, and those defendants who sided with him, that any such questions were irrelevant, and had such objection then been taken I would at once have so ruled. No such objection however was formally raised, and I did not see my way to overruling the question without a formal objection being raised. Afterwards when the defendants, other than defendant 1, began to feel that the length and expenses of this trial was becoming a formidable matter to them, formal objection was taken on their behalf to this class of questions. By that time, however, a considerable amount of evidence had been given, purporting to show that defendant 1 was an Asnashari. Mr. Inverarity, for defendant 1, thereupon objected to this evidence, at that stage, being held to be irrelevant for he claimed the right to have it all recorded, and to put his client into the box to deny the suggestions and all statements on the point. In my opinion he was justified in adopting this line of conduct, as otherwise the obvious result would have been that it would have been said that defendant 1 did not object to the evidence being given till he found that it was becoming too strong when he joined the other defendants in objecting to its relevancy. The evidence accordingly was taken. As I have said para 1 of the plaint is opposed to the defendant 1 ever having been an Asnashari. No suggestion of this sort was made on the Commission, and I am pretty sure I am right in saying that the only mention of Asnashari (not in this connection) is at pp.147 and 182 of book 1 of defendant's evidence on Commission.

It is necessary to consider now what the meaning of the term Asnasharis is. It literally means the Twelvers or those who believe in the 12 Imams only and not in the 48 Imams. Their names are Ali, Hasan, Husein, Zenal Abadeen, Mohamedan Bakar, Jaffer Sadak, Musa Kasum, Moosa Reza, Mohamed Taki, Ali Naki, Hasan Askari and Mohomed Mehdi. It will be observed that they branch off from the Ismailis at the 7th Imam, for the latter believe in Ismail, another son of Jaffer Sadak, and not in Musa Kasum. It appears that there have been several secessions among followers of the Aga Khans. Jaffer Pardhan at p.235, who is the present president of the council of the Jamat, says the first one was in S. 1933, A.D. 1876-77, when several persons were excommunicated by order of Hassan Ali for following the Asnashari faith. The next secession was in S. 1935, A.D. 1879-80, when two persons were excommunicated for the same reason. Then came the secession of A.D. 1901. This was the greatest of the secessions both on account of the number of the seceders, and the fact that the Asnasharis in that year built an Asnashari Musjid not very far off the Khoja Jamatkhana. The Exs. D.H., 63-67, are the advertisements which were published, one of them, D.H. 66, being timed to meet the Aga Khan on the occasion of his return to Bombay. The true reason was not given in the advertisements, says Jaffer Pardhan, as it is not true they have always been following the Asnashari faith. No doubt many of them were Asnashari at heart, but under the system of Takia they were afraid or disinclined so to announce themselves, although the witnesses, to whom I put the question, would not admit it. I think that the spread of Asnasharism is probably owing rather to a temporal than spiritual or religious feelings, viz., an increasing disinclination to pay the various sums which are due to the Aga Khan as Hazar Imam for the time being. Of course we could understand the witnesses not being anxious to admit this. A very large body of evidence was given on the point. Witness after witness was examined and cross-examined as to where and in what language and on what occasions the Rozakhani or recitation of the sufferings of Hasan and Husein were recited. Witness after witness was examined and cross-

examined as to whether the Ziarat (or doxology, if it may be so termed) does or does not form part of the Rozakhani, but in my opinion it is not necessary for me to go at length into the evidence which has been given in this matter. There can be no doubt that the mother of defendant 1 and some of his relatives are Asnasharis. He himself frankly admitted that he had been present on an occasion when the Ziarat to the 3rd, 8th and 12th Imams was said, but he did not repeat it (p.198). As a great deal has been attempted to be made of the faith of defendant 1, I think it is desirable to read his exact words (p. 214, line 22 to p. 216, line 4). To my mind it is impossible to believe that defendant 1 believes in a faith, the result of which belief would be that he was no longer entitled to his position of Hazar Imam, that he was no longer entitled to receive offerings from his followers from all over world, and, in short, as Mr. Inverarity put it, that he was practising a gross imposture. I cannot believe that if he really were an Asnashari, he would allow his followers to repeat in all reverence and on their knees in the Bombay Jamatkhana three times a day, the Doowa, D.H. 132 set out at length below a prayer in which inter alia all the 48 Imams are recited, and obeisance is made when the name of the Imam for the time being is uttered. The plaintiff and Coochick and their witnesses were driven to say that defendant 1 had invented the Ismaili faith as a new religion. Thus Coochick, p. 187 says:

"My case is that the present faith dates from Jungi's death, or a year after. The fanatic followers of the Aga Khan do date from that time. I cannot say before or after Jungi's death. The new religion has been going 15 years since Aga Khan's new Bhagats started preaching, 2 years before Jungi's death. I cannot say Doowa is a new invention of the last 12 or 14 years, since the present Aga Khan came of age. This new invention was never heard of before Jungi's death. Aga Khan has invented a new Doowa in Gujarati, the former one was in Arabic."

Again Malek Taj Begum, p. 246 says that she does not know of any sect of Shias who believe that Ismail was the 7th Imam, that before this suit she never heard it suggested by anyone that Ismail had succeeded Jaffer Sadak; that she believed it to be a new invention since this suit that Ismail succeeded Jaffer Sadak as the 7th Imam; she does not know when it was invented.

Upon this part of the case I have no hesitation in holding that the plaintiff has wholly failed to prove that the defendant 1 is or ever was an Asanashari, and that such an assertion is wholly contradictory to para 1 of her own plaint; her only explanation as to which has been that it was so stated by mistake and was overlooked by her. See page 66 where para 1 of the plaint is referred to and she says:

"He was not the hereditary Imam of the Khojas, who says that I do not say what is blasphemous. Hassan Ali did not claim to be direct descendant from Imam Ismail, son of Jaffer Sadak, as Ismail was not an Imam. It would be blasphemous to describe Ismail as Imam. The Imams are the 12 Imams. Any one who says, "Not", is blasphemous. When I signed the plaint I did not believe para 1 to be true. When it was read out to me, probably my attention was not called to it."

Again a considerable amount of evidence was given as to whether the followers of the Aga Khan would be permitted to put the Koran on their heads at certain times. The evidence shows that they do put the Panchtan (see Ex. D.H. 134), but whether they would or would not use the Koran in the same way seems to be wholly irrelevant.

In stating my conclusions as to the different faiths, the history of the Aga Khans, etc. etc. below, I may say they are derived from:

The celebrated equity suit in 12 Bombay, H.C.R. Watson's History of Persia, Articles by Dr. Leitner in Vols. 5, 6 and 8, Asiatic Quarterly Review, two articles by Sir Bartle Frere in Macmillan's Magazine, Vol. 34, 1876, Travels of Marcopollo by Lt. Hule; Huges Dictionary of Islam, 1896 and the Tarikh-e-Rashidi; Wilson's Mohomedan law; Amir Ali's Mohomedan Law.

It will, I think, tend to clearness if I now explain the various words which appear in the course of this case and must appear in the judgement:-

Imam means spiritual head or supreme Pontiff.

Mursheed means spiritual head.

Jamat is the congregation of all the adult male members of the Khoja community.

Jamatkhana is their meeting-hall or guild-hall.

Mukhi is the treasurer or steward.

Kamadia is the accountant.

Varas is the vazir.

"*Sunnis*" or the orthodox Musulmans, the people of the Souna or Tradition. Their Kalma or profession of faith is the simple one - "there is no God but God and Mahomed is the apostle of God."

"*Shias*" means either separatists, which is probably the more correct derivation, or persons who are pure from the blood of those members of the family of Ali, who early fell victims to the hostility of the Sunni Ommeiades, the Caliphs of Damascus. To the profession of faith of the Sunnis, above set out, the Shias add "and Ali, the companion of Mahomed, is the Vicar of God." The elevation of Ali, who, it is well known, was the son-in-law of Mahomed to an almost co-equal position with the apostle of God himself, may be stated popularly as the great distinctive tenet of the Shias.

The Shias are divided into several sub-sections, of which the chief are:

I. The Asnasharis or followers of the 12 Imams. Their last Imam disappeared in a grotto at Sumamram (Sirmanry) near Cupu in the 12th year of his age (according to Amir Ali, Vol. 2, p.11) or was thrown down a well according to Wilson's Mahomedan Law. He is believed to be still alive and they look forward to his reappearance to re-establish the universal Caliphate.

II. The Ismailis or followers of Ismail, one of the sons of Jaffer Sadak, the 6th Imam. In Bombay they comprise Bohras and Khojas. Both were converted in the early part of the 13th century from Hinduism to Islamism. The Khojas belong to the eastern sub-division of the Ismailis and are followers of 'The Old Man of the Mountain'. Their descendants, residing at Bombay, hold spiritual sway over them. The Bohras, on the other hand, belong to the western sub-division and their Dai-ud-Dawat or Grand Prior lives at Yeman (Amir Ali, p. 12-13), or as stated in Vol. 1 of Travels of Marcopollo, edition of 1903, pages 1904 and 141:- Adherents

to the family of Ali, as the true successor of the prophet, existed from the tragical day of the death of Husein and among these probably owing to the secrecy with which they were compelled to hold their religion, there was always a tendency to all manner of strange and mystical doctrines; as in one direction to the glorification of Ali as a kind of incarnation of the Divinity; in another direction to the development of pantheism and release from all positive creed and precepts. Of these, Aliites, eventually called Shias, a chief sect, were the Ismailis, who take their name from the seventh Imam, whose return to earth they profess to expect at the end of the world.

Some of the Ismailis apparently were known as Ali Ilahi, the origin of the whose name is to be found in a book called the Dabistan by Mullah Mohsain Fani quoted by Mr. Colebrook, an extract from which is to be found in the note at page 218 of the Tarikh-e-Rashidi by N. Elias and E.D. Ross, Sampson Son & Co., 1895.

Shia Imami Ismailis hold Ismail, the 7th in descent from Ali, to have been the last of the revealed Imams, and they also hold that, until the final manifestation of Ali, who as an Incarnation of God, is to come before the end of all things to judge the world, the musnud of the Imamate, or in Latin idiom the office of Supreme Pontiff, is rightfully held by an hereditary succession of unrevealed Imams, the lineal descendants of Ali through Ismail.

The revealed Imams, according to the Ismailis, are these seven:

(1)Ali, (2) Hasan, (3) Husein, (4) Zenalabadeen (this was that son of Husein who survived the massacre of Kerbala), (5) Mahomed Bakar, (6) Jaffar Sadak, (7) Ismail (who died before his father, and is called from his father's name Ismail bin Jaffar Sadak). But the Khojas regard the 2nd one, namely Hasan, merely as a Pir (see the Doowa).

But the unrevealed Imams continue down to defendant 1, who is the 48th. Their names are set out in Ex. D.H. 132, the Doowa. This exhibit, which shows the skilful blending of the ideas of the Hindu incarnations into the 10th or Dasavtar of Ali, is to my mind of such interest, that I set it out at length. It may be called the Imami Creed.

The Doowa

Say your prayers - Say your prayers - Say your prayers. May God Bless you! Take the name of God. May the Lord Ali grant you faith and modesty. O Shah, accept my evening prayer and supplication by virtue of the privilege Thou possesseth, O our Master Aga Sultan Mohamed Shah.

(Then) you are to prostrate. If it is the night prayer, say, "My evening and night supplications" and if it is the morning prayer, say "My evening, night and morning supplications."

Then repeat the rosary and prostrate.

Then repeat the following:

I repent for my sins. I repent for my sins. I am a sinful servant (of Thine), sinful from top to toe. O Shah, the Forgiver, forgive me. The Pirs pray (Thy) servant supplicates. Thou, O True Shah, accepteth the same. (I obey) the Firman (i.e.,

mandate) of the Shah as communicated by the Pir.

realpatidar.com

Having said the above, keep the rosary on the ground and repeat the following:

True declaration - God is Holy. Thanks to God. Praise to God. There is no God but God. God is great. There is no might or power except that of God, the High, the Great, the Merciful, the Magnanimous, the Good, the Great Holy Providence (Who is) in the district of Chaldea, in Persia, in human form, descended from the seventy-seven Patras (ancestors) and who is the forty-eighth Imam (Spiritual Chief) the tenth Naklanki Avtar, our Master, Aga Sultan Mahomed Shah, the Giver.

(Then) you are to prostrate. Then say, "Hak Shah" (i.e. O Shah, Thou art true) and repeat (the names of) the ancestors of Vishnu and of the successors of the Shah.

(Names of) Vishnu's ancestors:

The successors of the Shah say (the descendants of) Abu Taleb Vali (are):

1. Our true Lord Shah Ali.
2. Our true Lord Shah Husein.
3. Our true Lord Shah Zenal Abadeen.
4. Our true Lord Shah Mahomaed Bakar.
5. Our true Lord Shah Jaffer Sadak.
6. Our true Lord Shah Ismail.
7. Our true Lord Shah Mahomed bin Shah Ismail.
8. Our true Lord Shah Vafi Ahmed.
9. Our true Lord Shah Taki Mahomed.
10. Our true Lord Shah Razi Abdulla.
11. Our true Lord Shah Mehdi Mahomed.
12. Our true Lord Shah Kayem.
13. Our true Lord Shah Mansur.
14. Our true Lord Shah Moezz.
15. Our true Lord Shah Aziz.
16. Our true Lord Shah Hakem Abu Ali.
17. Our true Lord Shah Zahir Ali.
18. Our true Lord Shah Mustansirbillah.
19. Our true Lord Shah Nizar.
20. Our true Lord Shah Hadi.

realpatidar.com

21. Our true Lord Shah Mohtadi.
22. Our true Lord Shah Kaher.
23. Our true Lord Shah Ali Zakaria Salam.
24. Our true Lord Shah Ali Mahomed.
25. Our true Lord Shah Khud Jalaludin Hassan.
26. Our true Lord Shah Alaudin Mahomed.
27. Our true Lord Shah Ruknudin Khooor Shah.
28. Our true Lord Shah Shamsudin Mahomed.
29. Our true Lord Shah Kassam.
30. Our true Lord Shah Islam Shah.
31. Our true Lord Shah Mahomed bin Islam Shah.
32. Our true Lord Shah Mustansirbillah.
33. Our true Lord Shah Abd Salam.
34. Our true Lord Shah Garib Mirza.
35. Our true Lord Shah Budr Ali.
36. Our true Lord Shah Murad Mirza.
37. Our true Lord Shah Zulficar Ali.
38. Our true Lord Shah Nurudin Ali.
39. Our true Lord Shah Sayyed Khalilullah Ali.
40. Our true Lord Shah Nizar.
41. Our true Lord Shah Sayyad Ali.
42. Our true Lord Shah Hassan Ali.
43. Our true Lord Shah Kassam Ali.
44. Our true Lord Shah Abdul Hassan Ali.
45. Our true Lord Shah Khallilulla Ali.
46. Our true Lord Shah Hassan Ali.
47. Our true Lord Shah Aga Ali Shah.
48. Our true Lord Shah Aga Sultan Mahomed Shah the Giver.

Recognize him, the present owner of the Imamate, the Master of the Age, the

Imam, the guide of the guides, the (Imam) in Power, Aga Sultan Mahomed Shah, the Giver, the Reliever of innumerable and crores of persons, the present owner of the Imamate, O Shah accept my supplication in Thy presence by virtue of the privilege Thou possessest, O our Master Aga Sultan Mahomed Shah.

This Doowa is practically the same as the one in Hassan Ali's time, D.H. 128, and Ali Shah's time, D.H. 129 except the necessary addition of the Aga Khan for the time being.

Khoja means the honourable or worshipful person, the disciple.

Now, Khojas originally were Hindus of the trading class, inhabiting the villages and towns of Upper Sindh. Their language is Sindhi or Cutchi, a cognate dialect, and such ancient religious works as they possess are written in the Sindhi character and language. Sindh, an early Mahomedan conquest, has long had and still has a large Mahomedan population; but a considerable portion of the retail and wholesale business of the country has always remained in the hands of the Hindus. The position and circumstances of these remote and isolated Hindu traders were manifestly such as to favour their conversion to some form or other of Mahomedanism. It must be taken as established now that they were so converted by Pir Sadrudin about 442 years ago. And according to the tradition of the great body of the Khoja community, Pir Sadrudin came from Khorasan, and was an Ismaili Dai, or missionary, sent by Shah Islam, one of the ancestors of the Aga Khan, and the form of Mahomedanism which he taught his converts was the Shia Imami Ismaili faith.

In the well-known case decided by Sir. J. Arnould, The Advocate-General v. Muhammad Husein, Husein (1), that learned Judge sets out the various arguments for holding that Pir Sadrudin was a Dai, or missionary of the hereditary Imam of the Ismailis probably Shah Islam and that he converted the first Khojas to the Imami Ismaili form of Mahomedanism. To my mind the arguments he there adduces are such as no attempt as been made on the part of the plaintiff to shake in the present case.

Now it is admitted in this case that the followers of the Aga Khan are not necessarily limited to Khojas, and we find that his followers are to be discovered in Persia, Arabia, Zanzibar, Sind, Cutch, Bombay, Calcutta, Rangoon and other places. See the evidence of defendant 1 and that of his various followers who have been called as witnesses. It has also been proved in this case that for many years past the followers of the Aga Khan had been in the habit of making large voluntary contributions to their Sirkar Saheb i.e Lord and Master, out of religious feelings to the Imam for the time being of the Ismailis whom they revere as their Hazar Imam or their spiritual head. I give a list of the customary gifts and also the various names applied to the Aga Khan below.

Pir Sadrudin and Pir Kabirudin wrote the Ginans which have been put in evidence. The dasavtar was written by the former. The Dasavtar, as Sir Jospeh Arnould says, is a treatise in 10 chapters, containing as its name imports, the account of 10 Avatars or incarnations, each dealt with in a separate chapter. The first 9 chapters treat of the 9 incarnations of the Hindu God Vishnu. The 10th chapter treats of the incarnations of the most holy Ali. I state hereafter the effect of some of the ginans which were put in evidence before me as supporting the contention on behalf of defendant 1 that his followers were enjoined by them to make offerings to him alone.

In my opinion the Dasavatar, as might be expected, are the outcome of an astute and clever brain. The object of the author was to convert the Hindus to Mahomedanism, and the way in which he does this is by recounting the various Avatars of the God Vishnu until he finally comes to Ali, the son-in-law of the Prophet Mahomed. As we see in so many forms of religions, the author adopted the process of evolution. The same process can be traced through the various forms of serpent worship down to the time when the serpent is said to have tempted Eve in the Garden of Eden. The same process of evolution is to be seen in the various religions, the first forms of which spring from the form of the Lingain and the Yoni, and by a process of evolution and improvement ends in the idea of an Immaculate Conception. So, again, amongst the Hindus, there is a ceremony, at which I myself was many years ago present, wherein the leaves of the nim tree were crushed into a powder and handed round to the assembled community of fakirs who were bidden to eat the body of Shiva, a ceremony which, by the process of evolution, has resulted in what the Christian Church knows as the Holy Communion. In the ginans we find the doctrines of Mahomed as disclosed in the Koran largely prevalent. The oral evidence in this case affords a striking example of the theory I am advancing. Three witnesses were called before me who belong to what are known as Guptis. They are unquestionably Shia Imami Ismailis. But they certainly adhere to some of the Hindu practices, for instance they do not circumcise their males and they burn their dead, but they are true followers of the Aga Khan; and one could not help being struck with the dramatic aspect of the situation when two of those Guptis said that they had made a mehmani to the present Aga Khan in the Ritz Hotel in Paris in the shape in the one case of 50 English sovereigns and in the other of French notes of the value of 4 sterling pounds.

During the progress of this case I confess it struck me as a strange thing that there should be any antagonism between the Sunnis and the Aga Khan and his followers, for, in my opinion, by the conversion of a large number of Hindus known as Khojas, there have been received into the Mahomedan faith a large body of well-to-do, respectable and physically powerful members of the community, who, had it not been for their conversion by Pir Sadrudin and Pir Kabirudin, must have remained followers of the Hindu religion which, of course is absolutely different from the Mahomedan. The offerings to the Aga Khans, or, as one witness has called them, Ismail's Pence (Note to Travels of Marcopollo, 1903, pp.149 and 147) is in many respects similar to the well-known Peter's Pence which have been offered to the Popes for so many years. And the worship of or respect paid to Ali, the son-in-law of Mahomed, or as it might be called Aliolatry (in the East) seems to be analogous to the Mariolatry or worship of, and respect paid to, Mary, the mother of Christ (in the West).

Hassan Ali, the first Aga Khan (which defendant 1 tells us is not a title but a sort of "alias" a pet name when Hassan Ali was a young man) was the son of Khalilulla, who was murdered at the City of Yezd in Persia in A.D. 1817 in one of those brawls which are so common in Persia. The then Shah of Persia, Futteh Ali Shah, severely punished the assailants in the fray and conferred upon Hassan Ali large possessions, the government of the districts of Koom and Mehelat, and the hand of one of his daughters in marriage. This action of the Shah was no doubt prompted by his dread, lest he should be held responsible by the Ismailis for the death of their sacred Chief. The next we hear of Hassan Ali is in 1838 when apparently he revolted against the Shah of Persia and seized the government of Kerman, where he himself had numerous followers. The reason for his revolt was apparently that a favourite of the Prime Minister of Persia demanded in marriage,

for his son, one of the daughters of Hassan Ali, who would be, of course, the grand-daughter of the late Shah. The Prime Minister backed up his favourite's demand which was indignantly refused. Hassan Ali kept up his revolt till 1840, when, overpowered by numbers, he, with difficulty, escaped through the deserts of Baluchistan to Sind, where he was hospitably received. In Sind he found no money difficulties to contend with, for the Khojas there had always been his most zealous followers, and from them, and the other Khojas in the various parts of the East, he received ample supplies. He raised a body of light horse, who, during the latter stage of the Afghan War in 1841-42, were subsidized by Capt. Rawlinson for service under General Nolt in Candahar. For these services and others which he was able to render to Sir Charles Napier in his conquest of Sind in 1843-44 he received a pension of Rs. 3,000 per month from the Government of India. The present Aga Khan gets Rs. 1,000 from the British Government (see D.H. 227) since 10th May 1886. In 1845 Hassan Ali came to Bombay, where and at Poona he and his son and grandson have been residing.

In 1866 the well-known Equity suit came on for trial, which is reported in 12 Bom. H.C. Reports, the judgement wherein sets out the history of the Aga Khan and his followers, which, by the clearness of its arrangement and language, has formed the basis of all subsequent enquiries. In that case Sir Joseph Arnould, summing up the evidence before him, declares it to be judicially proved that "Mahomed Hussain, Hooseini, otherwise Aga Khan" or, as he is more formally styled when mentioned in official documents by the Indian Government "His Highness Aga Khan, Mehelati," is the hereditary chief and unrevealed Imam of the Ismailis, the present or living holder of the Musnud of the Imamate, claiming descent in direct line from Ali, the Vicar of God, through the seventh and (according to the Ismaili creed) the last of the revealed Imams, Ismail, the son of Jaffer Sadak.

His influence is much wider than was supposed when he first arrived in Bombay. In India it probably does not extend much beyond the Khoja community, who are chiefly settled in the maritime cities of the west, in Sindh, the Punjab, and Cashmere. But the members of Sir Douglas Forsyth's Mission to Yarkand ascertained that considerable communities of Shias, who acknowledge "Aga Khan of Bombay" as their spiritual head, and send regular tribute to him through agents in Srinuggar and other towns of Northern India, are still to be found far north, surrounded by the implacable Sunnis of Turkestan and Afghanistan. These Imami Ismaili Shias form the whole of the sparse population in many of the valleys leading down from the Pamir, the elevated "Roof of the World", on the banks of the higher Oxus, and its affluents - in Chitral, Gilgit, and in remote valleys between Kaffristan and Badakshan, hardly known to us except by name.

In Persia, Khoarsan and Western Afghanistan, there appear to be considerable numbers of the Aga's disciples, but they seldom, if they can help it, avow their allegiance to him whilst living under a Sunni government. In the maritime towns of the Persian Gulf and Eastern Arabia, especially under the comparatively tolerant rulers of Oman, the Khojas flourish, frequently having in some form or another, a claim to protection as British Indian subjects. On the African Coast they are found, in the same ports where Vasco de Gama found them as far south as Mozambique. It is probable that to this day, if a traveller wished to visit the Central Lakes in Africa, or the Ruby or Jade Mines of Badakshan in Central Asia, he could not do better than procure introduction from the descendants of the "Old Man of the Mountain" to his disciples in those parts. In the present case two witnesses, who had come all the way from Khorasan to see and do reverence to the Aga Khan

and were in Bombay, were called before me. I purposely do not mention their names, for, as one of them said, their position might be dangerous on the return to their country and their heads cut off.

Hasan Ali died in 1881 when defendant 1 was about four years old and was succeeded by his son Ali Shah, who had been appointed by him as his Pir or religious Deputy during his life time. Ali Shah was the Aga Khan down to the year 1885 when he died. When defendant 1 was eight years old, Ali Shah during his lifetime by a Firman appointed defendant 1, the Aga Khan, see Exhibits (51 and 52 on commission). But defendant 1 at the time of his father's death, being of tender age, the management of the estate and properties was taken up by Lady Ali Shah, until the year 1893, when defendant 1, at the age of sixteen years, took them up, leaving, however, the domestic portion of the management in his mother's hands to a certain extent.

I now state shortly the way in which the Aga Khans lived and brought up their families.

As I have said it has not been proved that the 1st Aga Khan retained any property in Persia, and I think I may take it that when he arrived in Bombay, he had to rely on his pension from Government and the offerings of his followers. Gradually he acquired properties, and there can be no doubt that he maintained his family and probably the large number of retainers who must have accompanied him from Persia. He gradually acquired immoveable properties in Bombay and elsewhere, permitted the members of his family and some of his retainers to reside in his various houses. He also acquired property in Poona, where he followed the same practice. As the family increased, the requirements of the family increased, and the property increased. In addition to that he fed, from a common kitchen, all the persons living on his properties. Allowances were granted in cash to some of the members of his family, out of which they provided themselves or perhaps some were provided by him with horses, carriages and servants. The same system was continued in the time of Ali Shah and after his death by Lady Ali Shah on behalf of defendant 1, and after defendant 1 entered upon his estate by defendant 1. I have been unable to discover any evidence to show that these allowances of cash, food, and residence proceeded from anything but grace and favour of the Aga Khan. And Exhibits 211, 215, 216 and 217 show that defendant 1 assisted and was begged to assist various members of his family with large sums of money.

The plaintiff's case is that the offerings made by the followers are for the benefit of the members of the family as well as for the Aga Khan, and on this point a great deal of evidence has been taken on commission. Before I deal with it, however, I would like to mention one or two points that strike me. The first, and I think the most important one, is that there is no assertion whatever in the plaint that offerings were made to the Aga Khan for the benefit of the members of the family as well as for himself. Para 2 of the plaint says, "As such Spiritual Head as aforesaid, the 1st Aga Khan was the recipient of large and valuable presents from the Khojas as aforesaid, and also from the Ismaili Shias. He also received an allowance of Rs. 3,000 a month from the Government of India. All the said emoluments or the investments now representing the same form as the plaintiff contends parts of the entire estate of the said family wherein she claims to have rights as hereinafter stated."

The written statement of the 2nd defendant does not set up such a claim. It simply

says she has been receiving allowances as of right.

realpatidar.com

Defendant 4, the widow of Jungi Shah, in her written statement, expressly disclaims any such rights.

It is not until we get to Coochick's written statement that this point is specifically raised. Para 2 of that written statement says:-

"The defendants say that the offerings from time to time received by the successive Aga Khans, beginning from Shah Hassan Ali, 1st Aga Khan, were and are received by them not for their individual benefit, but for and on behalf of and for the benefit of all the members of the family as shown in the pedigree, Exhibit A to the plaint. These defendant says that the whole family is held sacred by the devotees, as the family that supplies the Imam, and that the Aga Khan for the time being is the titular head and representative of the family."

There are certain other specific circumstances which were pointed out by Mr. Inverarity in his reply. At page 78 of Bhowanager Commission, Mr. Dadachanji made two admissions (1) that the offerings made by the followers of Aga Khan in the various Jamatkhanas were made by them on the occasions which have already been mentioned by the witnesses who have given their evidence. (2) that these offerings were collected by the Mukhi and the Kamadia and sent to the Hazar Imam in Bombay either through the Pargannah Kamadia or the Kul Kamadia by means of Hundies and deposed to by the witnesses. Then at page 110 Mr. Dadachanji says:

"My ease is that those relations of the Imam, to whom the followers paid moneys on kissing their hands, paid the moneys into the treasury into which the Imam's moneys lay, and the Imam and his relations lived together and enjoyed the benefits in these moneys which were mixed up with the Imam's money."

So at that time there was no suggestion that the Aga Khan is not the Hazar Imam. Then the plaintiff's advisers were going on the theory that the Gnans directed that the payments should be made to the members of the family, and they alleged that the meaning of the word "Ali" was progeny, but unfortunately for this theory Vazir Cassum Ismail was called a man of great dignity and good position and he explained the expression - see page 104:

"The expressions Aal Ali and the Aulad Ali which occur in the Gnans have always been understood by us, followers, to mean that descendant of Ali, who is on the gadi of the Imam."

And he quotes the actual Gnan which is Exhibit D.H. 292 and is to this effect:-

"The Aal Ali is the son of Salamshah Raja. As is Ali so is the Imam, thus says Kabiruddin is what Pir Sadrudin has said. The followers who believe this will get Paradise."

Salamshah Raja was the then Imam in the time of Pir Sadrudin. The commission shows Mr. Dadachanji absented himself when this witness was examined and did not turn up to cross-examine him and declined to give any reasons for his conduct.

At the hearing before me the plaintiff and her supporters were driven to contend that the Gnans were a recent introduction of the Aga Khan.

realpatidar.com

That commission lasted from the 26th November, 1906 to 2nd January 1907, and no question was there put challenging the fact that the Aga Khan was the Hazar Imam. Moreover, no question is put as to whether payments were made to the female members of the family, with the exception of payments to the mother of the Imam - see pages 59, 87, 142, 183 and 184. As Mr. Inverarity points out, this idea of the mother refers to the reference in the old Equity suit to the Mata Salamat, which referred to Hassan Ali's mother, who was appointed a Pir and therefore got offerings as a Pir.

Again at pages 183 and 202 questions are put exactly contrary to the written statement of Coochick. At page 183 the question is this: "If I prove that there has been an old custom before Hassan Ali's time to divide the offerings among the family of the Imam, what will you do?" At page 202 the question is: "Do you object to the custom in the Imam's family to divide the offerings among the family. The answer was, "Yes." According to this case then there was an old custom before Hassan Ali's time to divide the offerings. When we turn to the written statement of Coochick, we find it stated that the practice has grown up not to divide them.

Then in the 2nd Book - Commission at Rajkote, Calcutta, etc - there again there is no suggestion made that any offerings were made to the female members of Hassan Ali's family except his mother. And reliance is placed on the Gnans as being the authority for giving the family a share in the offerings - see pages 272. At page 246 you find the first suggestion that nephews of Ali Shah were paid their expenses at Rajkote. Then at page 335 you have the suggestion that the offerings were divided amongst the relatives in a fixed sum for each relative - see page 335. That commission lasted from the 13th January to 3rd April, 1907.

In the 3rd book of commission no question is put challenging the Gnans or challenging the Doowa as having been recent inventions.

Then in the evidence on commission on behalf of the plaintiff and the defendants who support her, which lasted from 31st August to 31st October 1907, no suggestion was made that the Gnans and Doowa were recent inventions, but every one who was asked admitted that he knew the Doowa and the Gnans as long as he could remember. Some of them said that they could not say whether the names of the 48 Imams were recited because they were said so low that they could not hear. An attempt has been made by the plaintiff and the defendants who support her to show that the Koran enjoined payment of offerings to the members of the family, but it is clear that the passage (see page 143, Sale's Koran, F. Warne and Co.) refers to spoils taken in war and not to offerings such as these in question.

Upon the first of the two main points in this case, a mass of evidence, has been given which of course I must deal with, and it may, I think be divided conveniently into two heads - (1) the evidence taken on commissions (2) the evidence given before me.

I propose to deal in the first place with the salient points in the plaintiff's evidence on commission. and I may say at once that the plaintiff's witnesses were called to prove generally that out of the offerings, utensils of the Jamat are bought, furniture is bought, repairs of the Jamatkhana made, expenses of lighting the Jamatkhana made, wages of the servants of the Jamat paid, hope is given to the poor persons belonging to the Jamat and out of that whatever balance is left is sent to the Aga Khan and his family.

The first witness of the plaintiff goes as far as to say that he considers His Highness the Aga Khan and his family as his Murshed i.e. spiritual leader. After denying that there are already factions amongst the Khojas in Bhuj, he admits that there are two factions amongst them. He says further that he knows some relations of the Aga Khan have filed a suit against him, but he does not know what the case is about. He does not know that they claim to have a right to a share in the offerings which is followers make to the Aga Khan. No one spoke to him as to the nature of the claim in suit. He does not understand what is meant by Ismaili nor what an Imami means. He does not understand what Shia Asnashari means, although he understands what a Shia means. He does not know who the 12 Imams are. When their names are given to him he says he does believe in them. He says that he only regards "the male members as our Mursheds, but we do not regard the females as our Mursheds. We regard them only as bibis of the Mursheds." He concludes by saying that he is a Khoja, but he is neither Ismaili nor an Asnashari. He does not know the distinction between the two.

The 2nd witness, Jaffer Mowji, does know what is meant by Asnashari Khojas. They believe in the 12 Imams only. He gives their names:- Ali, Hassan, Hussein, Zenalabedin, Mohomed Bakar, Jaffer Sadak, Moosa Kasum, Moosa Raza, Mohomed Taki, Ali Naki, Hasan Askari and Mohomed Mehdi. He believes only in these 12 Imams, as the true Imams descended from Ali. He does not accept the present Aga Khan as his Hazar Imam. He says he never heard a Doowa in his life and does not know that the names of the 48 Imams, including the present Aga Khan, are recited in the Doowa. His evidence is also very unsatisfactory as to there being two factions amongst the Khojas in Bhuj. He admits the Aga Khan is entitled to do with the monies, i.e. offerings, as he pleases. He cannot quote a single text from the Gnans, i.e. religious books of the Khoja faith, directing that the members of the family be recognized as Murshed; female members cannot be considered as Mursheds as they are merely Bibis.

The 3rd witness, Bundeali, denies that there are factions amongst the Khojas in Bhuj. He admits that "when the Talikas are received in the Jamatkhana, they are saluted and the seal thereon kissed by us," although he does not remember to have saluted or kissed a single Talika. These Talikas are from the Aga Khan Saheb and in his name. He admits that dozens of Khojas in Bombay and other places believe in the Aga Khan as their Hazar Imam as the Dhani of the Hazar Jome, and such Khojas are known as Shia Imami Ismailis. He does not consider any one as Imam except the first twelve. The female members of the family he does not consider as Mursheds. They are merely Bibis.

The 4th witness, Dalla Shivji, does not know that in the Doowa the names of the 48 Imams are recited. He recognizes only one person as the Murshed, that is the Aga Khan, who shows him the path in religion, and considers him alone as his Murshed. The monies are sent to him for the reason that he is Murshed. The members of the family would be entitled to the maintenance out of the payment remitted to the Aga Khan only if they are Mursheds and not otherwise.

Pir Mahomed Sanya, witness No. 1 on the Mandvi Commission, says that he regards Coochick as his Murshed. He regards the whole family of the Aga Khan as his Murshed. He regards every member of the Aga Khan's family as his Murshed, having the same position as the Aga Khan as Murshed. "We would give the same respect to any other Murshed from the family as we would give to the Aga Khan himself." He says he never kissed the hand of any relation of the Aga

Saheb whenever such relation might happen to be with him. But has kissed the hand of Aga Saheb on two or three occasions. Although he knows that 48 names are recited in the Doowa, he has not heard nor does he know the names, but he knows that 48 are the names from Hazrat Ali down to the present Aga Khan. He himself believes only in the 12 Imams. He says the Asnasharis believe in the 12 Imams, including Moosa Kasum as the 7th, and the Ismailis believe in Shah Ismail and his descendants as their Mursheds. He is not prepared to swear that the Ismaili Khojas do not believe in Shah Ismail and his successors on the gadi up to the present Aga Khan as their Imams.

Versey Banabhoy, witness No. 2, says that, out of the balance of the offerings, monies are sent to the Dharamguru for the maintenance of himself and the family, and he gives specific instance of money being paid to Ali Shah for himself and his family. He is a daily labourer, earning about Rs. 1 a day, the joint earnings of himself and his son. He has never heard the names of Shah Ismail and his descendants on the gadi down to the present Aga Khan recited in the Doowa. He would regard "all the descendants of our Mursheds down to the present Aga Khan" as his Mursheds. He also says that "the female members of the descendants of Shah Ismail would not be our Mursheds. They are merely their Bibis."

Haji Bibi Case part 2

Witness No. 3, Nathu Virji, is neither Shia Ismaili nor Shia Ashnashri. He cannot say what sort of a Shia Khoja he is. He does not understand what is meant by Shia Ismailis nor Shia Ashnashris. But he believes only in the 12 Imams. He also says that the Bibis of the Mursheds are regarded only as their Bibis. He has never heard the Doowa in which the names of the 48 Imams are recited. He admits that the Khojas of Cutch do not regard Coochick as Dharamguru, as they regard the present Aga Khan, and he says as follows:- "The present Aga Khan is on the gadi. I now say that my previous statement that all our Mursheds including the present Aga Khan, are entitled to equal respect and reverence is not correct. I cannot give the name of a single member of Aga Shah Hassan Ali's Family who has ever been regarded as Dharamguru by our Jamat or by any other Jamat anywhere else in the same way as they regard the present Aga Khan and his father and grand father respectively as their Dharamgurus. As a matter of fact the other members of Aga Shah Hassan Ali's family are not regarded by the Khojas as their Dharamgurus just as they regarded Aga Shah Hassan Ali and Aga Ali Shah as their Dharamgurus, and do regard the present Aga Khan as one. These three persons have been on the gadi." He also mentions one occasion on which Jumabhai Ismail said that the Aga Saheb was coming to the Mandvi harbour and something should be given to him for the family of Shah Hassan Ali, and another occasion on which he said it was resolved to give the Aga as nazrana Rs. 125. He cannot explain why, on the second occasion, no mention is made of the family of Shah Hassan Ali, and I should be disinclined to believe this witness altogether on this point. He says that except the present Aga Khan and Coochick Shah, he does not know that names of any members of the family of Shah Hassan Ali nor has he seen any.

Ladha Rahimtulla is a servant, and he says whatever balance of offerings is left is sent for the food of defendant 1 and the family of Hassan Ali, and that the money is sent for that family in order that the children may be fed because Hassan Ali "is our Murshed." It appears, however, that he earns only Rs. 10 a month. His evidence, as to the entries in his books, in cross-examination does not strike me as very satisfactory. He considers the present Aga Khan as his Murshed and apparently fences a great deal on the questions he is asked.

"Q:- Do you consider yourself bound to accept as your Imams such persons as Pir Sadrudin may have directed you to believe in?

A:- Yes. Even if Pir Sadrudin has directed us to recognize Salam Shah and his descendants on the gadi as our Imams, I would not recognize defendant 1 as Imam. My previous statement that I consider myself bound to accept as my Imams such persons as Pir Sadrudin may have directed us to believe in, is not correct and is false."

Mahomed Nanji, commission agent and doing business on his own account, similarly says that the balance of the offering is sent to Bombay for the family of Hassan Ali because he is their Murshed. He says that he was

present when the Rs. 125 spoken by Nathu Virji was paid for the family of Hassan Ali, and he says that it was said at the meeting that it was for the family of Hassan Ali. But although he says that he follows at present the Khoja Shia Ismaili faith, he cannot explain what Shia Ismaili means, and to the question "If those who follow the Shia Ismaili faith believe in Hazrat Ali and those who have succeeded him on the gadi down to the present Aga Khan as their Imams, do you still consider yourself as a Khoja following the Shia Ismaili faith," he answered "No;" from which it would appear as if his views on the subject of his own religion were somewhat obscure to say the least. Then he says he believed only in the 12 Imams. He does not consider himself at present bound to follow the Doowa in which the names of the 48 Imams are recited. He does not regard the defendant 1 as his Hazar Imam. From this it would appear to me that this witness is a seceder. He further says:

"When I said in my examination-in-chief that the balance, after consulting the members of the Jamat, is sent to Bombay for the family of the Aga Shah Hassan Ali, I stated simply what I had heard and not from my own knowledge. I have never seen since I have been acting as the Kamadia, or at any time before that, any writing in which it was mentioned that our payments were for Aga Shah Hassan Ali's family's maintenance; nor can I produce any such writing in support of my statement. I have not seen any entry in the books of our Jamat stating that the payments made to the Aga Shah were for the maintenance of Aga Shah Hassan Ali's family."!

His cross-examination, as to the payment of the Rs. 125 to the Aga Saheb, tends to throw considerable doubt on my mind upon his evidence on the point. He further says that the amount which each member of Hassan Ali's family would get would not depend upon the nearness of the relationship to the Aga Khan, and the males should get the same share as the females, provided they are the members of that family. He cannot answer the question: would you prevent the Aga Saheb from spending the monies as he likes? The note by the Commissioner at the foot of his examination shows that he is an unsatisfactory witness.

The next witness is Bandeali Dhalabhai. In cross-examination he says that he believes only in 12 Imams and not in the present Aga Khan as his Hazar Imam, whereupon his examination promptly concluded and the Mandvi commission closed.

Rahimtulla Hamir, the first witness on the Mundra commission, says, as usual, that whatever balance is left is sent to the family of Hassan Ali for their maintenance by the Jamat. He then describes in detail the Mehmani which his master had given to the Aga Saheb, but the first answer he makes in cross-examination is that he follows the Shia Ashnashri faith and has been doing so for the last 20 years. Before that he followed the Shia Ismaili faith. At present, as an Asnashari he believes only in the 12 Imams. He goes on to say that, as a Shia Ashnashari, he does not believe in defendant 1 as his Hazar Imam; those who believe in him as such are known as Shia Imami Ismailies. After he became an Ashnashari, he ceased making any payments to the Aga Khan and the Jamatkhana. When he was a Shia Ismaili, he believed in Aga Ali Shah as his dharamguru. Then he says. "I believed in him as my Murshed." He did not believe in him as being on the gadi of Hazrat Ali.

He did not believe in him as being on the gadi of Murshedship. He cannot point out any text from the Gnans directing that the Shia Ismailis should recognize the family of Hassan Ali as their Mursheds, and he further says, "when he said that Hassan Ali's family members were their Mursheds, he said so simply from what he had heard from other people in his Jamat." He goes on to say that all that he stated in examination-in-chief as to the disposal of the monies by the Jamat was stated on hearsay. His cross-examination on the Mehmani incident shows that he is not very reliable on the subject.

Ladha Vali is a trader at Mundra. He believes in the 12 Imams as his Mursheds and follows the Ashnashari faith. He does not say that the balance of the offerings is given to the family of the Aga Khan. In fact in cross-examination he says that no payments are made out of the collections made at the Musjid for the family of Hassan Ali or for any one else. They are not sent to the family of Hassan Ali, because those who attend the Musjid do not regard them as their Mursheds and have nothing to do with them. He does not assist the plaintiff's case much.

Ladha Dewsi says that the balances of the offerings is sent to the Aga Saheb for himself and his family, by which he understands Ali Shah's brother Aga Jungishah, Zenalabadeen. He also is an Ashnashari and used to regard the Aga Khan as his Dharamguru. He mentions a Mehmani given to Aga Saheb, but on cross-examination does not give very satisfactory account of it.

Adat Jirvraj is an Ashnashari. He also says that the balance of the offerings is sent to the family of Hassan Ali and he says monies used to be sent to Hassan Ali and his family from the Talikas which used to be received and which were read out in the Jamatkhana. He says these monies were sent to the Hassan Ali's family as Syeds, but the monies were never sent to them as Mursheds, and it is not correct to say that Hassan Ali and his family are the Mursheds of the Khojas.

Ladha Devji says the offerings were sent to the Bombay Jamat in order that they may be given to Hassan Ali's family. In cross-examination he says that he is an Ashnashari and then he makes the astounding statement that, during the 12 years that he attended the Bombay Jamatkhana, he neither heard the Doowa which used to be recited there nor did he know what sort of Doowa it was. He never heard the Gnans which used to be recited there, and does not even know that there are Gnans of Pir Sadrudin and Pir Hasan Kabirudin. He says only the male members of the family of a Murshed would be regarded as Mursheds. The female members would simply be the Bibis of the Mursheds. Hassan Ali never claimed to be an Imam. If he made such a claim, it was a false one. He never saw the Bombay Jamat making any payment to any member of Hassan Ali's family and the statement that the Bombay Jamat used to make the payment of the monies remitted to the family of Hassan Ali was made from what he had simply heard from the other Khojas, but he cannot give the name of a single such Khoja.

Datar Dina, witness No. 1 on the Bharapore Commission, is a grocer. He says that the balance of the offerings was sent to the Bombay Jamat for maintaining the family of Hassan Ali. He first says he had not seen Hassan Ali. Then he says he had seen him, but he does not know when and where.

He never heard the Doowa recited in his life. He does not understand what Khoja religion is. He has no idea of what a Talika means.

Mulji Rahim, the Patel of Bharapore and a cultivator, says that the balance of offerings is sent to Bombay to Hassan Ali's family. He does not understand what is meant by Shiah. He believes in the Imams whose names are recited in the Doowa. He regards the families of the 48 Imams from Hazrat Ali to Sultan Mahomed Shah as "our Mursheds." He admits, "when Hassan Ali was alive he was our Sirkar Saheb. On his gadi succeeded Ali Shah who then became our Sirkar Saheb. Sultan Mahomed Shah succeeded Ali Shah and he then became our Sirkar Saheb." He says that when the words "accept Moulana Sultan Mahomed Shah" used to be recited by the person who led the Doowa at the end of each Sujida, we used to make obeisance. He cannot produce any writing, entry or document of any kind whatever to show that the monies remitted by the Jamat are for all the descendants of Hazrat Ali or for the family of Hassan Ali.

Alidina Moledina, Khoja by caste, is an inhabitant of Kera. He says the same as regards the balance of the offerings and says he sends the monies to the family of Hassan Ali knowing them to be "our Mursheds" so that they may maintain themselves. In cross-examination, he says he believes at present only in the 12 Imams, not in the 48. He considers Shah Ismail as a Syed, as also all the ancestors of Hassan Ali. He says he may have read the Gans of Pir Sadrudin but does not remember them. He regards Hassan Ali as his Murshed because he gave Bodh to his grandfather who regarded him as his Murshed. He says that he heard Coochick giving Bodh at Kera in March or April 1907. He says that Jungi Shah gave him Bodh in Bombay in Samvat 1932. He says there can only be one Murshed. His name is Gadi Varas Aga Sultan Mahomed Shah. He says "We consider our Murshed as our Sirkar." He regarded Hassan Ali alone as the Sirkar Saheb. He cannot produce any document to show that any monies were remitted by the Kera Jamat to Hassan Ali and his family. He may have read the Talikas but he does not remember them. From his cross-examination with regard to the Police proceedings against him, it is evidence he is very hostile witness to defendant 1.

The next witness Nathu Gangji believes only in the 12 Imams and not in the 48. He goes to the length of saying that although he has joined in the Doowa which is recited by the Khojas in the Khoja Jamatkhana, he does not know how many names are recited in the Doowa and he has not heard a single name recited in the Doowa. He does not know how to recite the Doowa. He considers himself a Shia Khoja but not a Shia Imami Ismaili. He says that it is not recorded anywhere that the monies are sent for Hassan Ali's family. He speaks to defendant 1 having Karsazi placed at his feet when he came to Kera in Samvat 1960. According to him, the nearer relations of the Aga must get a larger share out of the monies remitted than those who are distantly related.

After this witness Alidina Moledina was recalled and his evidence shows that the books of the account of the Kera Jamat which he was directed by the Commissioner to produce in Court are not produced.

Abdulla Piradina, in business at Kera, speaks to the balance of the offerings

realpatidar.com

being sent to Bombay for the family of Hassan Ali. In cross-examination, he speaks to factions being in existence in the Jamat at Kera and his having been charged with rioting in the Police Court. He cannot account for the Kera Jamat being referred to as the Ismaili Jamat in the last hundies sent by the Kera Jamat except that it must have been by some mistake. He believes only in the 12 Imams. With reference to the Karsazis remitted to Bombay, he wrote in the books of account of the Jamat that the monies were remitted to the Aga Khan Saheb in Bombay. He tries to explain why the books of account were not sent before the Commissioner.

Meherali Mahomed is a cultivator at Kera. He says that the balance of the offerings is sent to Hassan Ali's family by which he means those born of him for their expenses. In cross-examination he describes how Coochick came to Kera, made a speech to the Jamat, and they placed 200 Kories before him. These monies were paid for Coochick himself. He also believes only in the 12 Imams. He says that the Jamat does not recognize the defendant 1 as their Hazar Imam.

Haji Kasam Haji Dhala, in business at Kera, is also an Ashnashari and became one about three years ago. He says except the 12 Imams, all the descendants of the Prophet must be treated as Syeds.

Meherali Rahim is the first witness at Anjar and is in business there. He says the balance of the offerings is sent to the Bombay Jamat for the family of Hassan Ali. In cross-examination, he says that his religion is that of the Musjid, i.e. belief only in the 12 Imams, which faith he has been following for the last 12 years. He does not know if defendant 1's name used to be recited in the Doowa after he came to the gadi. From the note taken during his cross-examination, he seems to be a most unsatisfactory witness.

Jaffer Hasan of Nagalpore, in business there, says the balance of the offerings were sent to the Bombay Jamat for the family of the Aga Sahebs who are "our Dharamgurus." He is also an Ashnashari as his father was before him. He does not know whose names are recited in the Doowa.

Hirji Visram of Sinugra, a grocer, does not know what is done with the payments made in the Jamatkhana. He also is an Ashnashari. He believed in the Aga Khan before he became so.

Ladha Pira says that the balance of the offerings is sent to the Bombay Jamat for the family of Hassan Ali who are his Mursheds.

Ladak Kanji of Nagalpore says that the balance of the offering is sent to Bombay for the Aga Saheb's family for their expenses as Hassan Ali was their Murshed.

I have gone at length through each of the witnesses on commission called by the plaintiff, and it will be seen from my remarks upon them as I went along that they do not strike one as being of a very satisfactory character, nor are they in as good positions generally as the witnesses called on behalf of the 1st defendant. Those witnesses were inhabitants of, and were examined at, Bhowanagar, Junagadh, Rajkote, Calcutta, Rangoon, Jamnagar and various parts of Cutch and Karachi and Zanzibar. They are taken from every class of the community. Looking at the mass of evidence they have

given, it would be impossible for me to go through each of them, as I have done in the case of the plaintiff's witnesses. [His Lordship referred to the names of different witnesses and continued.] I have selected these witnesses after perusing the whole of the evidence twice.

The first and most important point as regards this evidence to my mind is that it is evidence which is strongly against the pecuniary interest of all the witnesses. Very large sums indeed are paid from all these different places to the Aga Khan for the time being.

The following are the ceremonies and occasions upon which the Aga Khan is entitled to receive fees:-

Thalsufra: This takes place after the recital of Gnans is over, i.e., three times a day and sometimes twice. The followers or Murids bring from their houses sweetmeats, fruits, cooked and uncooked food, for the Hazar Imam. These articles are placed in trays on benches. Then the Mukhi Kamadia puts them up for auction in honour of the Hazar Imam. The first Mehmani fetches the highest price, the second less and the third is still less. The money is paid on the spot and the person paying it says: "This is the property of the Hazar Imam." After the auction is over, the followers come near the Mukhi Kamadia and ask him to invoke blessings on the souls of the deceased persons. For that money is paid. No sum is fixed. The Mukhi then joins his hands with the hand of the donor and says: "Ali Allah Niat Murad Kabulkare." May Ali (Allah) accept or fulfil these wishes. The money which is bid for the articles is more than the intrinsic value of them. The fruits, etc. may be eaten at the Jamatkhana or the houses of the purchaser. More than the intrinsic value of the articles is paid, because they are brought as the Mehmani of the Imam.

Again the Khojas drink water mixed with the Kerbella dust (Abe-Safa) daily and specially at new moon at the Jamatkhana. Money is paid to the Hazar Imam on that occasion.

Again the *Punjebhais* or the "Khas" special Murids of the Aga Khan make payments on the days on which they meet to recite a Mijlas of the Gnans and the tenth chapter of the *Dasavtar*. *Punjebhais* - one who joins palm with palm or five brothers or assembly of brothers. Each Punjebhai has a day allotted to him, e.g., the witness Joomabhai was a Wednesday and new moon day Punjebhai.

Again there is a box with a slit in it in the Jamatkhana and the safe itself has a slit in it into which payments are made to the Hazar Imam e.g. the Dassoos or the 2 annas in the rupee.

Again on the birth of a male Rs. 2-10-0 is paid and of a female Rs. 1-6-0.

For a marriage Rs. 8 for *Oomani Kori*, Rs. 10. is paid for *Mandwani Doowa* paid by the bridegroom's father. The bride's people pay Rs. 2 for *Mandwani Doowa*. It is said at the place where the marriage is performed. Doowa at the house is *Niat Murad*. At the house of bride and bridegroom - *Sar is Dasoon* - is a percentage on the dower 2 annas in the Rupee. The dower or *Dej* consists of ornaments and clothes.

realpatidar.com

In connection with death, the Mukhi Kamadia is sent for and the 10th chapter

of the *Dasavtar* is recited. The *Samar Chhanta* is performed with reference to death. Some people have it done when they are alive. Money is paid then for the Hazar Imam. After the body is buried, other payments are made at the Jamatkhana, namely, *Samar* money for the Hazar Imam alone. The object of the *Samar* payment is that the soul of the deceased may rest in peace and get *Sawab*. *Samar* = provisions for the journey. (Quere: The connection between this and the coin placed in the mouth of deceased Greeks to see them safely across the Styx).

Another payment is called *Sirni Halwa* (a sweet); when the Hazar Imam comes to the Jamatkhana, *Sirni* is placed before him. He touches it and the followers, after placing money before him, eat the Halva.

Every new moon there is a payment called *Chandraki*, which is taken into account when the Dassoos is paid.

On the 7th day of each month, the followers fast for 4 hours from 6 to 10 a.m., and payments are made in respect of the *Moula Ali Roza*. *Roza* = fast.

When the Hazar Imam names a child, a fee of Rs. 2-10-0 is paid for a male and Rs. 1-6-0 for a female child.

There is another ceremony called *Sir Bundi*, literally the offering of the head. In this ceremony the follower puts the whole of his property at the disposal of the Imam through the committee of elders in the Jamatkhana. But they magnanimously relieve him from such an excessive sacrifice. They fix the price at which he is to buy back the whole of his property and the price so fixed is paid to the Imam.

I myself went with the counsel of some of the parties to the Jamatkhana and saw the Thalsufra and Sir Bundi.

We sat on chairs in front of a raised seat or throne on which the Aga Khan sits when he attends the Jamatkhana. The whole large room was full of Khojas seated and at times kneeling on the ground, in another room the women of the community were collected in large numbers and going through similar ceremonies. It was a most impressive sight owing to the reverence with which the whole proceedings were conducted. I may mention that the plaintiff's and Coochick's counsel were invited to accompany us as was also Coochick himself, but for some reason or another--whether prudential or otherwise I cannot say--the invitation was declined.

The following are some of the titles of the Aga Khan:--

Hazar Imam Present Imam.

Hazar Jomejo Dhani=Present holder of the Mantle.

Hazrat Moulana Dhani=Present Lord, the owner.

Dhani Salamat (Datar) Dhani= Master--may he be safe, the Giver.

Pir Salamat Datar=Dhani Pir.

Khudavand=Lord.

realpatidar.com

Shah Pir= Great Lord.

realpatidar.com

Gur Pir=Spiritual instructor.

Pir Shah and others.

One witness Pirmahomed Ibrahim (p.428) said: "He is our Hazar Imam and the garland of my heart and the light of my eyes".

When these names are pronounced the followers bow.

The acknowledgements of the *Karsazi* (or remittances sent to Bombay) are described as in "the presence of Khudavand Dhani; Salamat Datar." 'Khudavand' meaning Lord.

One witness says:

"When the Talikas (i.e., documents which accompany remittances to Bombay) are received, we kiss the seals because they are the seals of the Hazar Imam.

Every witness before me when he mentioned the name of the Aga Khan made an obeisance, as they did during the evidence on commission--see page 377 (*inter alia*). Such of the Aga Khan's followers as are *Mukhis* and *Kamadias* do their duties gratis and out of respect and regard for him. When the Aga Khan entered the Court all his followers, who were crowded in it, rose up and I allowed him to give his evidence in a chair, so as to enable them to resume their seats.

Another fact which strikes one upon this point is that practically none of the witnesses on either side knew anything about who the members of the family were. They only knew one or two by name, e.g., Jungi Shah and Akbar Shah, and many of them only saw Coochick Shah on the commission. This fact is important to my mind because knowing the native character as one does, after a long period in this country, it is to my mind very difficult to suppose that all these persons for many years have been in the habit of contributing monies towards the maintenance of persons whose very names and relationship to the Aga Khan they were wholly ignorant of. But in my opinion the documentary evidence adduced on the commission on behalf of 1st defendant is of still greater importance.

As regards the oral evidence of course it can be said that the witnesses for the plaintiff support the case of the seceders, while the witnesses for defendant 1 support him and, therefore, the evidence on both sides must be largely discounted. But no suggestion has been made that the defendant's exhibits on commission, which amount to no less than 133, or any of them, are fabrications or forgeries.

I shall refer merely to the exhibits themselves for to deal with them in detail would take far too much time.

[His Lordship referred to the various exhibits and continued.]

Looking at all these exhibits, in not one of which does the name of any member of the family of any of the Aga Khans for the time being appear, it is

realpatidar.com

to my mind inconceivable that the parties paying these monies should not have made some mention about the members of the family had they intended the monies they paid or any part thereof to go for them. Not only are the followers of the Aga Khan in the habit of paying these large sums of money, but we find that in some cases monies were paid to the Aga Khan for the purpose of insuring their goods--see Ex. No. 4, page 6, and Ex. No. 62, page 93. Also as appears from Ex. No. 4 monies were paid to him to avoid the necessity of paying doctor's fees and also fees to lawyers, from which it would seem as though the followers believed that the Aga Khan was capable of ensuring them in respect of their spiritual as well as their material welfare, for there can be no question and in fact it is admitted by several of the witnesses on behalf of the plaintiff (before they seceded) that all the offerings are made in order that the persons making them may get Mukti or Sawab, *i.e.*, salvation in the next world.

In a case of this kind the principle to be applied has thus been laid down:

"In determining whether the performance of any particular rite promotes any particular religion, and benefits the members of the church or denomination, or body who profess it, the secular Court must act upon evidence of the belief of the members of the community concerned. It can have no other guide upon that subject:" *O'Hanlon v. Logue*.

1 [1906] 1, I.R.279..

It is well-known that in matters of this sort the human mind associates an idea of *reciprocity* and a few days ago I came across a note at page 25 of a book written by F. W. Bain, "In the great God's Hair", which seemed to me very apropos. It runs as follows: "Plato's idea that the relation between gods and men is one of commercial reciprocity is precisely that of the Hindus who lay it down in a hundred places as the essence of the "Stithi" or established constitution of things". Plato "Enthyphro" last page. Cf. Katha Sarit Sagar (last book), where the gods say to Shiva "the world of gods is always supported by the world of men;" also Kalidas' Raghuvansa, I, 18, where the king is thus commended. "He took taxes from his subjects only for their own good as the sun draws vapour up to return it a thousandfold to earth in the shape of rain." I would also refer to the well known text "lay up for yourselves treasure in heaven where moth and rust do not corrupt and thieves do not break through nor steal"

I now propose to deal with the evidence given before me on this point. As I have already pointed out the suggestion that the members of the family of the Aga Khan are entitled as of right to share in the offerings made to him is one not put forward in the plaint, and the evidence on the part of the plaintiff and her witness before me was of a very unsatisfactory character.

At page 28 the plaintiff says that the family was considered holy and the Khojas made payments or gave presents to the Aga Khan and his descendants and children. At page 57 she says:--

"Till I gave my evidence herein I had not alleged in any document whatever that offerings were made to the members of the family personally. At the time of plaint I did not recollect. I did not make this allegation in any of my affidavits nor in correspondence." At page 62 she admits that she never said

a word to Framji and Dinshaw, her then Solicitors, about sharing in the offerings. At page 64 she says:
realpatidar.com

"When I first received offerings from the Khojas personally, I was I can't say how old, but about ten or twelve years old. I can't give the names of those who gave me offerings personally. The offerings I got when so young were not my own property alone. I was not entitled to a share in them. But my parents were entitled to them."

Bibi Saheb says that money and embroidered cloth were given to the ladies of the family, and she sometimes received presents from the ladies of the Aga Khans' disciples. She does not know the Khoja's names nor the ladies names. She was once given a sovereign which she kept for herself. Plaintiff was not entitled to share in it. She did not give her any share in it.

Shah Bibi goes the length of saying at page 126 that money presents were given to the ladies by Khoja women which the ladies sent to the family Daftarkhana, and that she was a female Aga and received these presents as such, and at page 127 that the male members of the family received presents as being Agas. She also describes how the hands of the ladies of the family were kissed by male Khojas. See also her evidence at page 128, line 12, etc. At page 134 she says that she is the rightful Aga Khan at this moment and not her son Kassum; that she is the rightful head, but the defendant 1 has usurped it, a claim which she admits she never made before she got into the witness-box on that day. I would also specially refer to her evidence down to page 137 inclusive. At page 136 she swears:

I never heard of the Khoja Imami Ismailis till this moment. Nor have I heard of Imami Ismaili Khojas. Never up to this moment. I never heard of the Imami Ismaili faith up to this moment. Ali Shah and defendant 1 are simply *Peshimames*. I have never called them *Imams*. And nobody else called them so. The family is not sacred because they are *Imams* but because they are Syeds. The family has never supplied any Imam."

At page 137 she says:--

I did not tell my attorneys that offerings had been made to me before my written statement was filed or before the witnesses were examined. No suggestion about it is made in any of the affidavits."

At page 144 she can't give any estimate of the value of the presents given to her.

Coochick Shah at page 151 describes a Mehmani at Sialkote in November-December 1896 when Rs. 500 were placed in two saucers before himself and the Aga Khan. At page 152 he says he is not an Aga. He describes a Mehmani at the Aga Khan's premises in the lifetime of Ali Shah and several in the time of defendant 1. He describes another at page 153. He describes the kissing of hands of all the family at page 154. At page 172 he says that Hassan Ali's children are entitled to more of the offerings than his brothers. At page 191 he admits that he made a mistake in saying that at Sialkote 300 Khojas kissed his hand. He meant followers. He made a mistake in saying that 300 khojas, men and women, presented him with money, for he admits there were no Khoja followers in Sialkote. At page 197 he says that before he
realpatidar.com

was examined in Court he never mentioned the Dust-bossi or kissing of hand and presents made to him at Dizbad near Meshed.

Malek Tej Begum describes the giving of presents to the members of the family, male and female, and kissing of their hands at a marriage about thirteen years ago in Bombay. She says she has seen male members receiving presents from Khojas. She has seen her own husband receiving presents from the Khojas at Poona, and presents made to her brothers and all the members of the family and to Jungi Shah. At page 252 she says that the ladies are entitled to share in the offerings because they have got children who are descendants of Hassan Ali. At page 257 she says that she heard from defendant 1 when she was a mere child that all the properties belonged to the family, and that Ali Shah assured other members of the family, in her presence, to the same effect. At page 258 she says that defendant 1 assured her to the same effect at a conversation which took place about her husband's body being sent by train to Bombay. Defendant 1 has denied this. At page 260 she says:

"Khojas used to give me presents when I went to marriages at seven years old. I say as a fact I got presents from the Khojas when I was seven years old, because I was a member of the family. They were money presents. I have forgotten the amounts. The Khojas give money presents to the children of the family because they are holy."

At page 261 she can't say how much she used to receive, whether it was thousands or hundreds or hundred or tens or a few annas per annum. The only woman she can name as giving her money and an embroidered sheet was the wife of Kamaria Haji, but she does not know the Kamaria Haji and his wife had lost their only son before that date and that the wife was not going out then.

Gulam Hussein Alu Muraj says that he used to make presents to the Aga Khan and the members of his family. Money presents were put in the saucer and placed before the Aga Khan and each of the other members before their feet. He has seen the hands of the members of the family kissed several times. In cross-examination he can't remember how many saucers were placed. He can't swear that more than one saucer was placed. At page 302 he says:

There is no difference between the present Aga Khan and any other Syed. There are many thousands of Syeds in the world. There is no difference between the Aga Khan and any of those. I consider them all equal, they are descendants from Fatima. There was no difference between Ali Shah and the descendants of Syeds in the World. I give the same answer as to Hassan Ali. I do not believe that defendant 1 or Ali Shah or Hassan Ali are descended from Ismail at all; I believe they were Syeds because they said so. I am not doubtful whether they are Syeds. In Hassan Ali's time I believed that he was no better than other Syeds. He was no more to me than any other Syed. So as to Ali Shah, I take no more interest in him and his family than I do in that of any other Syed. This has been so ever since I can remember."

Karmali Haji Bhoga says *inter alia* that presents were made to members of the family and their hands kissed because they were considered as holy. In cross-examination he says that he is the Secretary to the Khoja Asnashari

Jamat and a member. At page 315 he will not swear that the monies paid at the Thalsfra are not absolute property of the Aga Khan for the time being.

Both these last witnesses are so unsatisfactory in the way they gave their evidence that I had to make a special note in each case of that fact.

Rehimtulla Ganji purported to produce certain entries of Mehmani to Akbar Shah. He said that he was not present when they were given. He also produced certain entries purporting to show that Akbar Shah had blessed some account books. But his cross-examination with regard to these books and entries throws a considerable amount of suspicion upon them.

Fazulbhoy Joomabhoy Lalji in the commencement of his evidence says there is no difference between the faith of a Khoja Ismaili and an Asnashari and he said to me that the Asnashris believed in 12 Imams. Khoja Ismailis believe the same and never believed any thing else. And again he says at page 345 that he really believes the first Aga Knan was an Asnashari. His statements strike me as so extraordinary that I do not feel disposed to attach much importance to his evidence.

Mahomed Fakira, page 369, says he may have made presents to the Aga Khan on Idd days and big holidays, and he did so to those members of his family who were present. He does not remember who they were. The present was made in the Jamatkhana. He may have made the presents at the Wadi. He does not remember. In cross-examination he can't produce any entry of the payment made by him, and does not remember whether the last time he made present was twenty or thirty years ago.

As against this we have the evidence of Lady Ali Shah, defendant 1, Shamsudin, and the other witnesses who support their case upon this point.

As I intimated on Saturday, the 11th April 1908--see page 353--that I was then prepared to hold that the payments made by the Khojas are for the benefit of the Aga Khan alone and not for the benefit of his family, I do not propose to discuss the evidence in support of defendant 1's case on this point in detail. But I must refer to the following exhibits which have been put in during the progress of his case, because like those which were put in during the commission they are unimpeached documentary evidence which strongly supports the view that I have expressed. [His Lordship referred to the exhibits and continued.]

I have no hesitation in finding therefore that the offerings made by his followers to the Aga Khan for the time being are intended by them to be for his own personal use and benefit and that those offerings are made to him from a feeling of deep veneration and reverence, the object of them being that while on the one hand he is to take them for himself, they on the other are to reap the benefit of them whether it be of a temporal or a spiritual character. Looking at the evidence given before me, were I to hold otherwise I should be dealing a blow at the faith of this large community scattered over all parts of the east, the results of which would be incalculable, and for which the evidence before me would not afford any justification whatever.

Before leaving this subject I must now refer to the various exhibits which have been put in from the Gnans which go to maintain the 1st defendant's

contention that his recognition by his followers originates from these texts.
realpatidar.com [His lordship referred to the exhibits and continued.]

These exhibits have not been impugned and of course strongly support the case of defendant 1 who, in my opinion, has proved (1) that the faith of the Shia Imami Jsmaili Khojas is founded on injunctions given them by Pir Sadrudin and Pir Kabirudin and contained in their above-mentioned religious books. (2) That other followers, e.g., the Punjabis were converted by Pir Shams, and their principal religious books are the Gnans of Pir Shams, and they also follow the Gnans of Pirs Sadrudin and Kabirudin. (3) That the Pandiat Jawan Mardi is the religious book corresponding with the Gnans by which the followers of this faith in Khorasan and other distant places are governed. All the witnesses maintain that they are required by their religious books which govern them to make offerings to the Imam.

I have now dealt with the first main point in the case and, before dealing with the second one above mentioned, I am compelled to deal with the various charges of fraud, murder, concealment of books and property, etc., alleged by the plaintiff and those who support her. For although they are not possibly very relevant to the case, looking at the evidence which has been given, it would be wrong if I did not deal with them fully.

Para 4 of the plaint charges that defendant 1 has sold off several properties therein mentioned belonging to the family estate and invested the sale proceeds thereof as well as other monies belonging to the family estate in the purchase of divers properties now standing in the names of his nominees. It has been proved to my satisfaction that this statement is entirely untrue. No evidence whatever has been given on the part of the plaintiff to show that either Hassan Ali or the two succeeding Aga Khans ever owned properties in Persia and elsewhere mentioned in that paragraph--See also para 56 of the plaint. It is highly improbable, looking at the circumstances under which Hassan Ali left Persia mentioned above, that he would be allowed to retain any property he may have had there. No question was put to the plaintiff in her examination on this point, and her cross-examination shows she had not got a single instance of making away with family property when she filed her suit, see pages 37, 38. At page 38 of her evidence she admits that the whole of the names she gave in answer to interrogatories 16, 17 and 18 were furnished *after* the plaint was filed, and she actually gives the names of the persons in whose names the properties are alleged to have been bought and describes the situation of the properties. Jaffer Cassum and defendant 1 have clearly proved that there is no property which has been sold. All properties that Hassan Ali possessed are still in existence.

Para 55 of the plaint says that defendants 9 to 14 allege that the first Aga Khan left a will which has been suppressed by defendant 1. Those defendants in their written statement say they have no knowledge of this alleged will. In the evidence, however, the plaintiff denies that she was told of the will by these defendants, but they say they told her. Of course if the will had existed it would have disposed of the plaintiff's case, but not an atom of evidence is given as to the will ever having existed.

I now deal with the charge against defendant 1 in respect of the murder of

realpatidar.com

Jungi Shah and his son. The plaintiff was at Jeddah at the time of the murder of Jungi Shah and his son in 1896 and describes it in her evidence-in-chief, see page 24. The plaint, para 35, says that in or about the year 1898 disputes began to arise in the family and have continued up to the present time. She was interrogated about this--Interrogatory 31--and in answer to that she said: "In 1898 disputes began to arise in the family in consequence of the murder of Hasham Shah". She was further interrogated, D.H.27 further answer to interrogatory 31, and after dwelling at length on Hasham Shah's murder she introduces the murder of Jungi Shah at the end of that answer as follows:

"About this time my husband sent a petition to the Viceroy for investigation into the incident of the murder of my father Jungi Shah and my brother Shah Abbas at Jeddah in 1896. The Aga Khan came to know of this petition and showed his resentments there at."

It is material here to mention that Jungi Shah and his son were murdered in 1896, i.e., two years before the disputes were said to have begun. Pages 24 and 25 of her evidence-in-chief show how she intended to insinuate that defendant 1 and his mother stifled the inquiry into these murders, and her counsel declined to say whether he suggested or insinuated that defendant 1 instigated these murders. Her counsel said that he was only leading the evidence to show how the ill-feeling arose, and on that ground the evidence was held to do relevant. The malicious animus of the plaintiff was apparent when she said that her father and brother were killed by two "Fidavi" Khojas who are devotees of the Aga Khan and obey him. How she knew they were Fidavi Khojas she does not tell us. As I have said, the murder of these two men occurred at Jeddah, defendant 1 was in Bombay. He went to meet the body of Jungi Shah at Karachi and brought it down to Bombay. The evidence is uncontradicted that he was much distressed at these murders. Shortly afterwards he married his present wife, the daughter of Jungi Shah. Jungi Shah's family was present on the occasion, and all were on the best of terms. The marriage was celebrated in the usual way and the children of the family were dressed in uniform and played an amateur band which was got up for the occasion. If a petition was sent to the Viceroy, as is stated, the original or certainly a copy of it must have been procurable, and the plaintiff admits, page 36, that the Aga Khan's name was not so much as mentioned in the petition. Bibi Saheb in her evidence says they got possession at Jeddah of the murderers' blankets and shirts, but says they brought nothing back to Bombay. Malek Taj, page 235, says that she saw the plaintiff had a blanket in her hand at Jeddah. She tied it up with other articles belonging to herself, and then she goes on to describe how the plaintiff told her that she had given the blanket to Cassum Mussa and he took it away with him. In cross-examination she says:

"The colour of the blanket was black. It looked black to me, no other colour. It was in plaintiff's hands. I saw it at a distance and saw no other colour. I believe there was a picture of a lion on it. I don't remember the colour of the lion whether it was black or not. I remember a black blanket with a lion on it after twelve years as a person remembers things, I have never seen the blanket since that morning. Plaintiff got the blanket I don't know from whom."

realpatidar.com

In my opinion the suggestions and insinuations made against defendant 1 with reference to the murder of Jungi Shah and his son are absolutely without a shadow of foundation and ought never to have been made.

Moreover, as pointed out by Mr. Inverarity in his reply, they are quite inconsistent with plaintiff's affidavit where she suggested that the reasons for stopping the allowances was that she had instructed Framji and Dinshaw to proceed against the Aga Khan.

I now deal with the charge against defendant 1 in respect of Hasham Shah's murder. This first appears in the plaintiff's further answer to interrogatory 31--D.H.27--where she sets out her case as to this and suggests that the Aga Khan was desirous of shielding the murderer Jiva Juma. She also there suggests that the murderer Jiva was never examined on oath and if he is examined further he would say that the Aga Khan had instigated the murder. The plaintiff in her examination-in-chief gives her account of it at page 25 where the plaintiff's counsel would not give any answer to Mr. Inverarity's question whether it is suggested that the Aga Khan had anything to do with Hasham Shah's murder. Plaintiff's counsel evidently did not fancy this suggestion much, as at page 88 he expressly said he was not going to ask Bibi Saheb any thing about Hasham Shah. At the time Hasham Shah was murdered, defendant 1 was in Europe and his mother was in Arabia. The telegrams that defendant 1 is said to have sent showing that he was anxious to shield Jiva Juma have not been produced. I can not attribute much importance to Mrs. Kenny's evidence, whose memory is evidently not very clear in the matter. The jury recommended Jiva Juma to mercy which looks as if they believed the confession of Jiva which has been put in as H. 26. Defendant 1 only knew him by sight and Lady Ali Shah did not know him at all. The letters D.H.57 and D.H.58, the former undated and the latter of 11th September 1898, written by defendant 1 to Kenny, show that defendant 1 was much upset by this murder. See also Kenny's evidence at pages 229 and 230. The letter D.H.59 to Kenny, dated 17th November 1898, show that defendant 1 was anxious that Shah Bibi should show some moderation in her conduct in this matter. I cannot possibly believe that defendant 1 threatened that the fate of the murdered man might befall his brother Kassum Shah as the plaintiff swears he did. On the contrary, the evidence shows that defendant 1 has provided for Kassum Shah and supplied him with funds to enable him to hold a commission in the Cadet Corps. I find this charge wholly unfounded.

As to the charge that defendant 1 has made away with any account books, I hold it to be entirely disproved, and it is unnecessary in my opinion to discuss the evidence relating thereto beyond referring generally to what Lady Ali Shah and defendant 1 have said on the subject. That some of the account books were burnt by accident at Bantwa is clearly proved.

The next charge involves the other main question in this suit which, of course, is of very great importance, namely, whether the release of the 11th September 1901 was a sham or a false and fraudulent document concocted by defendants 1 to 5. This is a matter with regard to which I must obviously go into detail to a considerable extent. As to its being a "sham" it is difficult to say it was, when I find as a fact that properties worth above a lakh of rupees were transferred by it to Jungi Shah's estate and Rs.40,000 paid on his execution.

Whether it was fraudulent I proceed to discuss.

realpatidar.com

realpatidar.com

Haji Bibi Case part 3

Whether it was fraudulent I proceed to discuss.

It is clear, I think, that on the death of Hassan Ali, somewhat of what Mr. Justice Batchelor in his Judgement on the Rule has called a "scramble" took place, and I find it proved that on that event his son Akbar Shah took possession of one bungalow at Bandra and a garden at Bund River, Poona, his other son Jungi Shah took possession of a bungalow at Mount Road, the Piroo Lane property and the property known as Hamamkhana at Babula Tank Road; Ali Shah took possession of (1) property situate at Bellasis Road used as a Commission stable; (2) property situate at Babula Tank Road opposite J.J. Hospital; (3) property situate at Bhendy Bazar; (4) one bungalow at Love Lane; (5) one bungalow at Love Lane; (6) one bungalow at Love Lane; (7) one property at Nesbit Lane; (8) one bungalow at Love Lane; (9) one bungalow at Bangalore; (10) one house at Karachi; (11) one bungalow at Connaught Road (Poona); (12) one bungalow at Civil Lines (Poona); (13) one bungalow at Lothian Road (Poona). These last 13 items are so stated in defendant 1's written statement and have been proved except as to 10, for it was a mistake to include the Karachi property, for one property there was purchased and built upon by Ali Shah and cost altogether about a lakh and another property at Karachi was bought by the present Aga Khan. In addition to the immovable property which Akbar Shah took possession as above, he also took possession of a large quantity of jewellery and cash, the property of his late father, and in this he was assisted by Haji Baig, who was the favourite wife of Hassan Ali and mother of Akbar Shah. Ali Shah was not at that time in Bombay. The respective immovable properties taken possession of by the three sons as aforesaid were kept by them and continued in their exclusive possession respectively. It has been clearly proved that Akbar Shah after his father's death advanced very large sums of money on mortgages amounting to over a lakh of rupees - see Mr. Kola's evidence. It is also proved that he bought a large quantity of Government Paper - see Exhibits D.H. 304. It is also proved that he took possession of the Gold Racing Cups which his father's horses had won, and Coochick admitted that one certainly of those cups had come into his possession before he saw the point of the question which was being put to him in cross-examination. Akbar Shah can only have got these sums from what he appropriated of Hassan Ali's property. We have in evidence, Ex. D.H. 28, the will of Jungi Shah whereby *inter alia* he purports to dispose of the properties which he had appropriated under different names, viz., the Chawl near the Mogul Mosque in favour of Lady Hajia Bibi; as to the Hamam (bathroom) which is near the above-mentioned Mosque in favour of Lady Shahzadi Begum; as to the large bungalow which is situated on the Road to Hassanabad in favour of Zenalabadeen Shah and Shamsudin Shah and Shah Abbas.

The plaintiff by D.H. 11 swore that the properties at Piroo Lane, Mount Road, and Hamamkhana did not form part of Hassan Ali's estate at the time of his death, that the Mount Road properties were purchased by Jungi out of his own savings and income and that the Hamamkhana was built by him; but at page 52 of her evidence she says that as to the big bungalow at Mount Road she does not know whether her father was given it by Hassan Ali or whether her father bought it out of his own pocket money. She says:

"I say out of my common sense that my father bought it out of his own money; no

one told me. In my affidavit I say nothing as to it being bought out of my father's property. Man is liable to err. Before today I have never suggested that this property was given to Jungi Shah by his father that I remember. I forgot about it. I made four affidavits on the Rule."

Now there is no doubt that Jungi Shah during Hassan Ali's life-time did manage his father's estate (see Bibi Saheb's evidence, page 106) and there is no doubt that this Mount Road property was in the name of Jungi Shah. But there is documentary evidence as to this property, for it was bought for Rs. 60,000 when Jungi Shah was 26 years of age - See D.H. 84, letter of 27th June 1874, Dallas and Lynch to the Collector, and the conveyance H. 13 of 15th November 1874, which is the conveyance from Khatao Makanji to Jungi Shah who curiously enough is therein described and referred to as the son of the Aga Khan.

As to the Hamamkhana, Bibi Saheb at page 104 says:

"The Hamamkhana property was built before I was born. It has been there since I can remember. I have not seen it, only heard about it. I heard it was in the hands of my brother Jungi. I don't know anything more. In Hassan Ali's life it was in possession of Jungi. Jungi told me so - no one else. He casually said that it was his possession when he was talking to a servant. I don't know how long ago he said this. No one else was present. I don't know how Jungi got the Hamamkhana."

As I have pointed out the plaintiff in D.H. 11 swore that the Hamamkhana was built by Jungi. It appears that the Hamamkhana was built on the corner of the Khoja burial ground - see the plan D.H. 96. One thing is certainly plain from Shah Bibi's evidence and that is that she, in 1907, thought that the big bungalow in Mount Road, the Piroo Lane and the Hamamkhana properties, belonged to Hassan Ali because she admits that her attorneys wrote that she had an interest in those properties (see Ex. D.H.45).

When that letter was written she thought the three properties belonged to Hassan Ali. Malek Taj in her evidence at page 250 says Jungi Shah had bought these three properties with his own money and that he was in possession of them since Hassan Ali's life. She admits that she has no claim to it but says that her children have, although she says that when D.H. 45 was written she intended to make a claim to these three properties for the sake of her children.

As regards the Piroo Lane property the plaintiff at page 56 says:

"The Piroo Lane property was acquired, since I remember it was in my father's possession. I don't recollect when it was acquired. I can't say my father bought it or it was given him by his father. I don't know it was bought at all events before 1861 A.D. I can't say it is at corner of Parel Road and Jail Road. It is called Jail or Imambara Road."

Bibi Saheb says it was bought but she does not know when. She heard it said that it belonged to Jungi. She does not recollect who told her or who was present nor when she was told. She was gold before the death of Jungi but she can't say how long before. She can't remember whether it was before or after Hassan Ali's death. She does not know to whom Piroo Lane property belonged. But the Plan D.H. 99 and the Draft Deed D.H. 100 describe the southern boundary of the property in that deed as bounded on the south by the property of Shah Hassan Ali Mohamed Hoosein *alias* Aga Khan, which shows that it was known as Aga Khan's property

before the 30th of October 1861. That this deed was admissible for the purpose, is, I think, clear from *Ningawa v. Bharmappa*. 1897 I.L.R. 23 Bom.63 From the Municipal Book, Exhibit D.H. 117, it appears that all the property about this Piroo Lane was in the name of Mohamed Shabudin Pilanker and in 1881, D.H. 114, the Piroo Lane stood in Aga Khan's name, and the Collector's books show that a small piece of it was never taken out of Pilankar's name.

In my opinion Mr. Inverarity was fully justified in saying that he has proved that these three properties belonged to Hassan Ali's estate and were properly taken into account at the time of the release.

The direct evidence as to the preparation and the execution of the release is to be found in the evidence of Shamsudin, of defendant 1 and of Mr. Kola. I refer to these gentlemen's evidence at length.

Shamsudin says that about the end of June 1901 he thought to divide his father's property amongst his heirs. He went and saw the plaintiff about it and she asked him what he was going to give to Zenalabadeen's children. He told her that Zenalabadeen having predeceased their father his children were not entitled to anything by law. She asked for some provisions for them. He said he was willing to give them a share if she would be satisfied by taking the Piroo Lane property as her share and the various sums she had got from him (Shamsudin) through her husband Moochool after Jungi's death (see Ex. D.H. 140). Shamsudin was not to ask for any account of these monies and she was to get Piroo Lane property. She said she would agree if he first gave a share to Zenalabadeen's children. But he declined as he would be a loser if after that all the heirs including the plaintiff asked for their full share. He said if she executed a document in the form of a release to Jungi's estate he would give a share to Zenalabadeen's children in consideration of her getting Piroo Lane and having got other monies. She asked him to bring the sort of document he wanted her to execute and show it to her. Thereupon the letters D.H. 141, D.H. 142, and D.H. 144 passed between him and the attorneys Payne, Gilbert, Sayani and Moos. Immediately after getting D.H. 144 he went to the plaintiff on the same day with H.15 and D.H. 143. He found her at Malek Taj Begum's house.

Looking at the cross-examination of the plaintiff by the Advocate-General, pages 73 and 74, and comparing it with the evidence of Shamsudin, which I have just referred to, together with paras 12 and 13 of Shamsudin's affidavit, pages 154 and 155 of the printed Appeal Book, I am inclined to give greater credence to Shamsudin's story of this interview than to that given by the plaintiff and Coochick. An attempt was made to show that Shamsudin had tried to cheat the plaintiff by handing her Ex.H.15, the draft conveyance of the Piroo Lane property, with the power of attorney at the end of it, in the month of August 1901. According to the plaintiff and Coochick the latter ingeniously fixed the time as about that of the cricket matches. But I am satisfied that the interview in question between Shamsudin and the plaintiff took place in June 1901 and before Shamsudin had any idea that the Aga Khan would agree to give any property to Jungi's estate.

The letters D.H. 141, dated 30th June 1901, and D.H. 142, dated 2nd July 1901, were written by Payne & Co., to Shamsudin. Then there is a draft conveyance of the Piroo Lane property (D.H. 143): then there is D.H. 144 which shows that the draft conveyance was sent to Shamsudin by attorneys on 23rd July 1901. He got it on 24th July 1901 at Poona and went at once to see the plaintiff more than a week

before the Aga Khan was spoken to. At that time it seems to me it had not occurred to Shamsudin to get anything out of defendant 1.

I think there is no doubt that the plaintiff was anxious to get something for the children of Zenalabadeen. By the letter of 30th June 1901 to his attorneys Shamsudin asked for a release to be drawn in favour of the plaintiff and to convey the Piroo Lane property to her. That strongly supports Shamsudin's evidence that he told the plaintiff she should take the Piroo Lane property if she wished to give a share to Zenalabadeen's children. I now refer to Shamsudin's interview with defendant 1 at the end of July. (His Lordship after reading the evidence at pages 112-116 continued).

Defendant 1 says that about the end of July 1901 when he was at his house near Poona, Shamsudin came there and said *inter alia* that he wanted to distribute his father's properties amongst his father's heirs, of whom the Aga Khan's wife happened to be one; that Shamsudin gave him some idea of the value of his father's property and said that his idea was to give the plaintiff the house in Piroo Lane and to defendant 1's wife the Hamamkhana, specially as those two ladies were enjoying at that time the rents of those two properties. Then Shamsudin suggested that defendant 1 should give up for Jungi's estate the property at Mazagaon which was occupied by Jungi's family. Defendant 1 was somewhat surprised at this and asked why should he. Whereupon Shamsudin said that after Hassan Ali's death, Ali Shah and Akbar Shah had appropriated more than Jungi had. Defendant 1 told Shamsudin that he knew perfectly well that eight years before to the knowledge of Jungi and Akbar and everybody all the portions of Aga Khan's property appropriated by Ali Shah in Bombay had been transferred to defendant 1's name and that any claim that Jungi might have had was long barred, and that even supposing the amounts which the defendant 1 had paid to Jungi out of favour and bounty were taken into consideration Jungi had long ago been repaid by Ali Shah and defendant 1. To this Shamsudin, he says, replied that he appealed to his good nature affection and suggested that the three houses at Mazagaon and a sum in cash, which was not then named, should be given to Jungi's estate. Defendant 1 then goes on to say how he consulted his attorney Sayani, after which he told Shamsudin he would not discuss the matter until he was properly constituted administrator of Jungi's estate. After letters of administration were applied for and granted to Shamsudin (H.2 and 3) he came to see defendant 1 again in Bombay about four weeks after the first interview. The estate manager was consulted as to the value of the property appropriated by Ali Shah alone, and he said about eight lakhs of rupees. Shamsudin said that the value of the property his father had appropriated was Rs. 90,000, and he made up the share of Jungi's estate upto 2.1/4 lakhs. It was then arranged that the three houses occupied by Jungi's family and a sum of Rs. 40,000 should be given by the Aga Khan to Jungi's estate and such a release should be passed as Sayani should prepare and he left the preparation of the release entirely to the Advocate-General and his attorney Sayani. He goes on to say that the reason why the Mount Road property and the Hamamkhana were not mentioned in the Schedule to the release was that Sayani said that the Mount Road property happened to stand in Jungi's name and it might legally affect the title if it were included: and as to the Hamamkhana it happened to be built on the Khoja burial ground and as it was actually in the possession of defendant 1's wife, Sayani said it should be omitted. The release was drafted and settled by the Advocate-General and Shamsudin had his own attorney Kola. At the execution defendant 1 paid Shamsudin a cheque of Rs. 40,000 in the presence of Kola and Sayani, which has

been debited to his account, and defendant 1 estimates the value of the property conveyed to Shamsudin by the release at a lakh of rupees. The properties were transferred from his name to the name of Shamsudin in the Municipal books, and Shamsudin has paid the rates and taxes since the release.

But the evidence does not depend on these two witnesses alone, for Mr. Kola, an attorney of this Court, who acted as Shamsudin's attorney with reference to the release, has given evidence before me, and the way in which Mr. Kola did give his evidence impressed me most favourably, and I do not hesitate to say that I believe every word that he said. He says that in September 1901 Shamsudin brought to him a draft release of which D.H. 145 is his office copy, and said that Sayani had advised him to come to him and that Shamsudin was in a great hurry. Mr. Kola wrote his first letter on 10th September 1901, the 2nd letter in H.1, to which he got a reply the same day, the 3rd letter in H.1, appointing the time for a meeting on that day at Sayani's office. Before going there, he describes how he went through the draft release with Shamsudin, and as to the various recitals in the release his evidence entirely corroborates the case of defendant 1. He then goes on to describe the alterations in H.6, the draft copy and what was done with regard to them; and he says that Sayani told him that the conveyance of Mount Road property had already been taken in Jungi's name and as the legal estate was already in Jungi it would be improper to take a conveyance of it from the Aga Khan. As to the Hamamkhana, he understood Sayani to urge an objection on religious ground - as it was a religious property he did not think it desirable to insert it. And he describes how the Advocate-General inserted certain words (see D.H. 165) to which he was compelled to assent. After he saw Sayani, he saw Shamsudin the next day, the 11th September, and told him what had taken place between him and Sayani. He said that this time the arrangement that had been come to on the facts given to him was highly beneficial to Jungi's estate. The impression Shamsudin gave him was that he was acting in the interest of the estate as he was very anxious to carry out the arrangement as soon as possible. He then goes on to say how he saw the release executed and a cheque for Rs. 40,000 handed by defendant 1 to Shamsudin. Nothing occurred to lead him to believe the release was a sham document not to be acted on. He goes on to say that the only thing that struck him was the hurry on the part of Shamsudin. But in cross-examination he says after the reason Shamsudin gave him, it did not strike him as extraordinary, the reason for the hurry being, as appears in the correspondence, Shamsudin was desirous to leave Bombay. Mr. Kola gives another reason for the hurry, and that was that the arrangement was so beneficial that no time should be left for the Aga Khan to change his mind, for he understood Shamsudin to say that the Aga Khan might change his mind at any time, for what was being given was a matter of favour. Even if a gift, the Aga Khan might go back on it.

On the 11th September 1901 the release was executed. That document recites (1) the death of Hassan Ali in 1881 leaving three widows, three sons and three daughters and properties in Bombay, Poona, Bangalore, and Karachi; (2) that Ali Shah entered into possession of the properties described in Schedule A thereto all except the property in B thereto that is the Piroo Lane which Jungi Shah entered into possession of; (3) the death of Ali Shah on the 17th of August 1885; (4) the management of defendant 1's mother of the properties in A (by an evident error the property in B is not excluded here); (5) entry into possession by defendant 1 of the said properties; (6) the transfer into defendant 1's name of all the properties in A; (7) sole possession by defendant 1 of the said properties; (8) the death of Bibi

Tajmah, Jungi's sister, and his mother, leaving Jungi as one of their heirs; (9) exclusive possession by Jungi of the property in B since the death of Hassan Ali; (10) entry into possession by Shamsudin of the property in B; (11) application by Shamsudin for Letters of administration to Jungi's estate on the 28th August 1901; (12) contention by defendant 1 that neither Jungi nor his estate has any claims on the properties described in Schedule A, or against the estate of Hassan Ali because it was barred; (13) acknowledgement thereof by Shamsudin; (14) acknowledgement by Shamsudin that all payments, allowances, food and residence allowed to the different members of the family of Hassan Ali, including Jungi Shah, were a matter of grace and favour and not as a matter of right, by reason of any custom or usage; (15) agreement by defendant 1 to convey to Shamsudin as such administrator the property described in Schedule C being part of the property thirdly described in Schedule A and to pay to him the sum of Rs. 40,000. For the purposes of stamp duty the property in C was taken at rupees one lakh. The conveyance witnesses that defendant 1 grants to Shamsudin the property in C being part of the property thirdly described in A, that for that consideration and the sum of Rs. 40,000 Shamsudin as such administrator and also in his own right as one of the heirs of Jungi Shah releases and discharges defendant 1 and his estate, etc., and the estate and effects of the said Ali Shah and Hassan Ali including the properties described in Schedule A, save that portion of the property described in A as is conveyed to Shamsudin from all claims and demands of the estate of Jungi either as one of the heirs of Hassan Ali or as derivatively interested in such estate through his said sister or mother. This release to operate as a full and complete discharge in respect of any and every possible right, claim or demand of the estate of Jungi Shah deceased whether past, present, derivative or contingent to, upon, and against the estate of the said Hassan Ali deceased and the said Ali Shah deceased and the Aga Khan and his estates and effects, and lastly the Aga Khan releases, conveys and assures unto Shamsudin all the right, title and interest of the Aga Khan in and to all the lands, etc, in Schedule B. As to the recitals, I think it material to observe that they were put in by Mr. Sayani, who knew all about the matter, and defendant 1 had really nothing to do with their insertion.

To my mind, looking at the evidence before me, it is impossible to say that this release was a sham, was fraudulently concocted between defendant 1 and Shamsudin. There was certainly no concealment about it. It was settled by the Advocate-General and I have been wholly at a loss to discover the grounds upon which it is sought to impugn. It was acquiesced in by the plaintiff down to the time when she filed her plaint herein. She admits she knew of it in January 1902, see her attorney's letter of 25th 1902 in H.7. Her plaint was declared on 20th September 1905. She knew that if Framji's diary was received in evidence it must put her out of Court on this point of limitation.

Her claim against Shamsudin to set aside the release is clearly barred. Owing to the defendant 1's absence from Bombay, which must be excluded from the period of limitation, I do not think I could hold it barred as against him. No authority has been cited upon this novel point, namely, where two persons are charged with fraud and the suit is barred against one of them, whether it will lie against the other whose absence from Bombay takes him out of the Statute. It is not necessary, however, for me to decide this novel point because I am of opinion that upon the merits the plaintiff has got no claim against either defendant 1 or Shamsudin.

realpatidar.com

Para 15 of the plaint expressly says *inter alia* that allowances were given to and

received by the said several members of the family as a portion or on account of what they have been, are, or would be, entitled to receive as heirs.

The following statement shows the amount of allowances received by Jungi Shah and his estate:-

Amount received by Jungi Shah as allowance from 1881 (May) up to 1894 (May) at the rate Rs. 677 a month (13 years) up to the time of the death of his mother Mariam Khanum Rs.105,612

Amount received by Jungi as allowance from May 1894 up to his death in May 1896 (2 years) at the rate of Rs.777

per month Rs. 18,548

Equivalent in value of food and requisites to Jungi Shah

for 15 years as admitted by Haji Bibi in answer to

interrogatory No.24 at Rs. 2,000 Rs.360,000

Amount received by Shamsudin as allowance from January

1896 to June 1896 at the rate of Rs. 200 a month Rs. 1,200

Amounts received by Shamsudin as allowance from July 1896

to March 1897 at the rate of Rs. 300 a month Rs. 2,700

Amount received by Shamsudin as allowance from April 1897

up to August 1901 at the rate of Rs. 777 a month Rs. 41,181

Amount received by the widow of Jungi Shah as allowance

from 1896 up to 1901 Rs. 4,800

Equivalent in money value of food and other requisites

supplied to Shamsudin from 1896 up to 1901 at the rate

of Rs. 1,500 a month Rs. 90,000

Equivalent in value of food and other requisites supplied

to Haji Bibi at the rate of Rs. 1,200 a month from 1896

up to 1901 as admitted by her in answer to interrogatory

No. 27 Rs. 72,000

Rs.696,041

N.B. This does not take into account what had been received by

Zenalabadeen as allowance and food and other requisites.

realpatidar.com

Nor does it take into account the rates and taxes which were paid by the Aga Khan. Nor the large sums spent on the repairs and new buildings on the properties left by Hassan Ali which in the event of a partition would have to be taken into account. If on the other hand the payments were not payments on account then from 1881 when Hassan Ali died to 1901 the date of the release more than twenty years elapsed.

According to this it appears to me that Jungi Shah's estate has been largely over-paid. I cannot find evidence to justify me in holding that Hassan Ali's estate after deducting what was appropriated by Akbar Shah and Jungi Shah amounted to more than eight lakhs of rupees at the outset. It is a most remarkable fact that the plaintiff gave absolutely no evidence on this point although in the plaint she says that his property was worth two crores. I see no reason to disbelieve the evidence of Mr. Merwanji upon the value of the immoveable properties in 1901.

The reason for not including the Mount Road and the Hamamkhana property in the release is clearly stated in the evidence of Mr. Kola and Shamsudin viz., that the Mount Road property already stood in the name of Jungi Shah. The Hamamkhana property had for a long time been in the possession of defendant 1's wife, one of the daughters of Jungi, and it was deemed undesirable to cloud the title as to those two properties by mentioning them in the release.

The portions of Mr. Framji's bill of costs, which, in my opinion, were admissible, show that the plaintiff was fully acquainted with what was being done with regard to the release. That she knew that the entries in the bill of costs must prejudice her is apparent from para 6 of D.H. 2, the plaintiff's affidavit, which she made on the application to prevent Framji and Dinshaw acting as defendant 1's attorneys in partnership with Payne & Co. The entries of the 12th and 14th March 1902 D.H. 25, pages 21 and 22, show that Coochick was well aware of all that was being done. Plaintiff's husband did not die till April 1903 and he assisted her throughout. As to the bill of costs, it is to be observed that at page 73 the plaintiff denies every material statement therein; but in her re-examination, pages 79 and 80, she admits that the entries are true and said that she was confused before lunch. And also in re-examination, letter H. 17 of the 14th August 1902 is put in, where the plaintiff says inter alia: "I do not ask for my share in my grandfather's property at present." See also her attorney's letter of 9th September 1901, the last letter in Exhibit H.7.

Defendant 1's account of what happened after the release had been executed is as follows:- Six months after the release was executed Shamsudin came to him in Bombay again and asked him to give to Jungi's estate a portion of his estate at Poona, namely, that portion which Jungi's family usually occupied. Defendant 1 at first demurred but on his persisting he at last said without admitting any right he would hand over to Jungi's estate a portion of the Poona estate. After that the plaintiff came to see him some days after in Bombay. She first thanked him for making over the Poona properties to Jungi's family and then made a further suggestions, namely, that he should buy from Jungi's estate two of the houses at Mazagaon which he had made over in the release and then make a present of one of those houses to Moochool and the other to Coochick to which defendant 1 said, this was a most extraordinary suggestion, that Moochool and Coochick were neither the heirs of Jungi nor of Hassan Ali, and he saw no reason why he should make such a present. He told her that he could not consider such a suggestion and she left; D.H. 25, the entry in the Bill of costs dated the 9th April 1902, shows

that Mr. Moos had an interview with Framji on this matter which Mr. Moos told defendant 1 of; defendant 1 declined to give Poona property or anything more and told Mr. Moos and Shamsudin so. Defendant 1 goes on to say that plaintiff never suggested at her interview that the release was a sham and a fraud, or that it was a matter of right and that she was entitled to it. Till she filed this suit she never suggested that the release was a fraud.

The conclusion that I have come to is that defendant 1 treated the family of Jungi Shah in a generous and liberal spirit, that they got considerably more from him than he could have been held bound to transfer to them, and that had it not been for the attempt made to get something further out of him for the benefit of Coochick and Moochool, no attempt would have been made to set the release aside; and it is specially to be remembered that all the other heirs of Jungi Shah, who represent 25/32nd of his estate support the release.

I must now shortly deal with the other charges of fraud which the plaintiff has made against defendant 1.

With reference to para 56 of the plaint at page 38 she says she charges defendant 1 with having put moveable property in the names of strangers in Europe.

"I mean shares. I don't know their names - many persons can't give names." I don't know that any share bought by him in Europe is registered in his own name."

She cannot mention the other properties of great value therein referred to.

When cross-examined as to para 4 of the plaint where it is said, "Defendant has sold many properties," etc., she says, page 38:

I heard he sold a property of the first Aga Khan's estate to HajiMohamed Cassum. I don't know where the property is situate. In the course of conversation with some acquaintances I heard about this. I was told this 6 to 24 months ago, since I filed my plaint. I can't remember now any other property. I have got no copy of the conveyance from the Registrar's Office yet."

Again as to para 56 of the plaint she says (His Lordship read from page 37, line 9, down to page 38, line 10, of the printed book of evidence and continued.)

Then as regards the Jamatkhanas, no doubt Hassan Ali in his answer in the Equity suit claimed considerable powers of management over them but he certainly did not claim them as his private property, see para 1 of his answer therein. And neither Ali Shah nor defendant 1 has ever claimed the Jamatkhanas as their private property. In H 21 defendant 1 clearly sets out his position as to the Jamatkhana.

Again as regards the Khoja burial ground, that has never been claimed by any Aga Khan as his private property although no doubt they have claimed to exercise a veto as to who should be buried there.

Bibi Saheb claims no share in the Jamatkhanas or the burial ground and to my mind it is obvious that they could not be taken into account as is sought to be done by the plaintiff.

Again as regards the Pallonji's Hotel, that was settled as wakf on 12th January 1857, see H. 29, long before the plaintiff was born; Bibi Saheb expressly disclaims

any share in this property which was settled as wakf - see page 110, line 21. It was alleged that the Aga Khan had applied the rents of this property to the benefits of the family. No evidence whatever was given in support of it and defendant 1 swore that he spent more on this wakf property than the rents of it amounted to, and it is to be noticed that at page 54 of her evidence the plaintiff admits that she did not mention the Pallonji's Hotel in her affidavit as having been kept out of the release nor the Jamatkhana nor the burial ground.

Again the plaintiff at page 54 charges defendant 1 with fraud in not including Payne & Co.'s office building in the property of Hassan Ali. She goes on to say: "I don't know who told me but I heard so. It was bought. I don't know when, I have not enquired." D.H. 102 of 11th December 1882 is the conveyance to Ali Shah after the death of Hassan Ali, which shows that this is indeed a reckless charge of fraud.

As to the property at Kerbella, Kazmin and Samera with regard to which she charges defendant 1 with fraud, His Lordship read her evidence from page 54, lines 23 down to page 56, line 20.

Jaffer Cassum gives the details as to the other properties viz: - that the Ahmedabad properties were bought after Hassan Ali's death by Ali Shah in 1882 and 1884, that the Rajkote property was bought in Hassan Ali's lifetime by Ali Shah in 1866 for Rs. 2,150. He also produced the conveyance of the Karachi property which was Ali Shah's, dated 30th June 1880.

It must be borne in mind that the plaintiff's witnesses were all agreed that provided that the members of the family were duly and properly provided for, all the properties bought by Khalillulla, Hassan Ali, Ali Shah or defendant 1, out of the balance of the offerings were their own properties, and they claimed no share in them - see page 54, line 2, the plaintiff, pages 67 and 69 page 122 line 20, Bibi Saheb; page 202 the bottom, and page 203 Coochick. No attempt has been made to reconcile their admissions with the plaintiff's present claim to her share in Hassan Ali's estate. For at all events during the life time of Hassan Ali and Ali Shah there was no reason to complain that the members of the family were not duly provided for in all respects. I would add here that no attempt whatever has been made to get over the difficulty in plaintiff's way viz, that as long as the Letters of Administration in favour of Shamsudin stand unrevoked she is not entitled to sue and it certainly is a strange thing if her case be true that when defendant 1 had all the immoveable properties transferred into his name, see D.H. 212, application for transfer 24th January 1893, when the usual Battaki was beaten, no remonstrance or objection was lodged by any members of the family to this being done.

The next question that I have to consider arises on paras 13 and 14 of the plaint, issues 26, 27, 28, 29, 30, 31, 32 and 33, and in para 3 of Coochick's written statement the custom is relied upon which is there set out.

And here I may at once say that I find none of the requisites which are necessary to establish a valid custom, according to her, have been established. I find it neither ancient nor continued nor uniform nor reasonable nor certain and definite nor compulsory and not optional to be followed or not. And see Sir Braja Kishore Deva Garu v. Kundana Devi (1) where it is said "how can there be a custom to do that which the general law permits any one to do or abstains from at his own will?"

A very large quantity of evidence has been given on the questions of residence and the allowances, food, horses and carriages, and wedding and funeral expenses.

In the first place, as regards residence, in my opinion, the evidence given by Lady Ali Shah, who displayed an extraordinary memory when giving her evidence, outweighs that given on behalf of the plaintiff. At the commencement of her evidence she describes in which portions of the property various members of the family were living. She also describes how other persons who were not relations of Hassan Ali lived in the various blocks. It is of course not necessary to follow in detail the various changes that were made with regard to these various blocks in the way of residence. She goes on to show what the system adopted was with regard to Hassan Ali's property at Poona. Looking at the evidence on both sides as to the residence in the Poona property, I find that the bungalows there in Hassan Ali's time were in the charge of Hassan Ali's Karbhari and the keys of them when unoccupied were kept by him, that in Ali Shah's time he settled who should occupy the various portions of the Poona houses, and that his Karbhari was in charge of the bungalows and kept the keys when they were empty. His name was Mulla Sana, that both Ali Shah and Hassan Ali paid the taxes and repaired all the bungalows in Poona and Bombay; that on the death of Ali Shah the same Karbhari Mulla Sana, during her management, looked after the bungalows in the same way, and that she managed the Bombay properties in the same way as Ali Shah had done.

Defendant 1 speaks to the same arrangement after he entered into possession of the estate.

If, therefore, the bungalows in Bombay and Poona were the property of the successive Aga Khans, I see no reason to disbelieve that their permission would be asked by the various members of the family as to what portions of those bungalows they should occupy, and I see no reason whatever to suppose that at any time any member of the family claimed this right of residence adversely to any of the Aga Khans, and it is to be noted that the plaintiff and her witnesses do not claim any right in the properties or any portions thereof themselves, but a right of residence, as it were a floating right of residence over the whole of them. I find that it is not proved that every male member of the family on attaining majority and every female member thereof on attaining majority or on marriage has resided rent free in some house or houses appertaining to the said family estate as in para 13 of the plaint set forth. On the contrary there are numbers of the members of the family who have not had residence on the property at all. The plaintiff herself never had any residence, but only through her husband Moochool Shah. It is not necessary to set out the specific instances of those members who have never resided on the property nor the specific instances which show that members of the family did not get the right of residence on attaining majority and female members on attaining majority or marrying, because to my mind nothing approaching a regular practice or custom such as is alleged in the plaint or Coochick's written statement has been proved. Ex. D.H. 249 is the list of persons not getting allowances though entitled to them. Ex. D.H. 250 is the list of the persons getting allowances. In the same way with regard to the monthly allowances. There can be no doubt in my opinion, looking at the evidence with regard to Nasser Shah, that in his case he was deprived of his allowance in consequence of his own behaviour. It is not suggested that he took any steps to enforce his right to it. Here again Lady Ali Shah's evidence, pages 21 to 26, gives in great detail the actual cash allowances that were given, and *inter alia* she denies that there was a fixed scale

by which Hassan Ali's sons and daughters got allowances. She denies that his sons got a fixed allowance of Rs. 1,000 a month, each of his wives Rs. 300, and his daughters Rs. 200 a month.

Then as regards food: there is no doubt that both in Poona and Bombay the members of the family staying in these respective places were provided with food from the common kitchen, but this practice does not seem to have been confined to the members of the family alone but to such retainers or servants as the Aga Khans might wish should have the benefit of it.

As regards carriages and horses, the claim put forth on the part of the plaintiff certainly seems an extraordinary one, for we are told that a member of the family would be entitled, as far as I can make out, to as many horses and carriages as he or she chose. Then we were also told that if any one of them demanded a motor car it ought to be supplied to him.

As regards wedding expenses in which case again the plaintiff claimed on behalf of the members of the family that they should be entitled to as much money as they wanted for their marriages. She says, page 45, that when she married five marriages took place and the expenditure was two lakhs of rupees from what she heard. In re-examination she gave the names of other persons then married. But Lady Ali Shah says the outside sum spent on the five marriages was about a lakh or less, and she denies that the plaintiff could have demanded two or three lakhs as presents and her sisters the same each, and that each of Akbarshah's sons could have demanded 6 to 8 lakhs of presents, and that a grandson of an Aga Khan, whose father was dead, was entitled to Rs. 20,000 to Rs. 50,000 as of right as a wedding present. She also denies Coochick's statement that Rs. 40,000 could be demanded as of right. (See Coochick, page 178).

On this point it appears to me that the plaintiff and those who support her have formed enormously exaggerated opinions of the wealth of the Aga Khans as they did in estimating their properties at two crores of rupees.

The conclusion, then, that I have come to on this part of the case is that all the Aga Khans had been men of exceptionally generous disposition. They have maintained large numbers of the members of their family in a lavish manner as also numbers of their retainers and servants, and in my opinion they have done this as a matter of grace and favour. No claim whatever was put forward to any such right prior to the disputes in this case. No mention of such a claim is made in the will of Jungi Shah or in any other document.

On the questions raised by the issues I have above referred to, therefore, in my opinion defendant 1 is entitled to succeed. It is I think desirable that I should make some observations on the demeanour of the principal witnesses.

The plaintiff, Coochick and Malek Taj Begum, struck me as false witnesses in anything they said. Of course as regards the ladies I could not see their faces as they were covered from head to foot in black dominoes with white pieces of muslin let in across the face. But one has only to read the evidence of plaintiff and Malek Taj Begum to see how full of inconsistencies and untruths it is. I had several times to warn Malek Taj Begum. As for Coochick he was in every way an unsatisfactory witness. He gave his evidence partly in an impudent way, partly in a hesitating way and seemed to me a wholly false witness. His evidence as to the Mehmani at Sialkote has been absolutely discredited to my mind; his own admissions, as to

this incident in cross-examination threw the greatest possible suspicion on his statements. But he is wholly disapproved by the evidence of Mukhi Amirchand and the account book, Ex. D.H. 205, in which any Mehmani of Rs. 500 had been given, it must have appeared. Similarly his evidence as to the Mehmani at Disbad has been wholly discredited by the other witnesses who spoke to it. I consider Coochick a false witness in every material statement that he has sworn to.

It is necessary for me to explain the circumstances under which the counsel for plaintiff and those defendants who supported her retired from the case. At the beginning of the case to my astonishment it was suggested by plaintiff's counsel that I should not try the case as I was what he termed a friend of Aga Khan's. Mr. Inverarity replied that in that respect I was in no different position probably than all the other Judges in Bombay. I said I had exchanged calls with the Aga Khan and had dined twice with him and had asked him to dinner and he had not been able to come. This incident determined me to allow all the possible latitude I could to the plaintiff and the defendants who supported her in putting their case before me for it occurred to me as not unlikely that her counsel might retire from the case and insinuations might and would be made against me during its course. This conjecture of mine was confirmed as the case proceeded. During the examination of the witness on the Commission questions were constantly put to them against which they protested on the ground that their religious feelings were being offended. During the progress of the trial it was notified to me that if similar questions were put to the witnesses in this Court and then with the answers to them published in the newspapers there would probably be an outburst of hostility between the Mahomedan communities in Bombay. When the defendant 1 was being cross-examined a question was put to him which was couched in - to my mind - terms calculated to cause excitement and animosity. There was really no need to put the question to defendant 1 in any such terms, as he had already answered it in the answer to the interrogatories. There was absolutely no need to put it in the terms in which it was put. I pointed this out to the counsel who was cross-examining defendant 1, but he insisted on putting the question as at first. And defendant 1 answered it. I then intimated that if similar questions were to be put, I should clear the Court. The next question was on the same point and I at once ordered the Court to be cleared. The Court was then crowded with Mahomedans - in fact more crowded than I had ever seen it in any case - was cleared. While the Court being cleared, I asked counsel for defendant 1 and plaintiff to come up to me and explained to them my reasons for ordering the Court to be cleared. They returned to their seats and after the Court had been cleared, plaintiff's counsel said that under the circumstances he had instructions not to proceed with the case. His instructions were not to proceed with the case if it was not fully reported, as the plaintiff's case was, and that his client fully realised the importance of this step. Thereupon he and the counsel for the defendants who supported plaintiff's case withdrew. This action on their part confirmed me in the opinion I had formed many days before they retired, viz., that they were "riding for a fall." In my opinion just as when every case in which unpleasant details are likely to be disclosed (e.g. criminal or divorce cases), the Judge is entitled to order the Court to be cleared, so in India when the evidence in any case if published in the daily papers is likely to arouse religious or political disquietude, the Judge is entitled, if not bound, to exclude the general body of the public and decline to let the evidence be published.

realpatidar.com

Haji Bibi Case part 4

I find on the issues as follows, and I direct that the issues and my findings thereon be mentioned in the decree, as I am assured that this is a convenient course to adopt:-

1. Whether the offerings and presents received by the first Aga Khan and each of his ancestors since A.D. 1770 and earlier from the Khojas in Bombay and elsewhere and also from Ismaili Shias or the investments now representing the same form part of the entire estate of the first Aga Khan's own family as alleged in para 2 of the plaint?

No.

2. Whether the offerings and presents made to the first and second Aga Khans respectively were not the absolute property of each of the said Aga Khans respectively and whether the plaintiff is entitled to any interest in such offerings and presents as alleged by her in the plaint?

Yes, (the first part) and No, (the latter part).

3. Whether there are any investments now representing the offerings and presents received by the first Aga Khan's predecessors who were spiritual heads of the Shia Imami Ismailis as stated in para 2 of the plaint?

No evidence - No.

4. Whether the first Aga Khan received an allowance of Rs. 3,000 per month from the Government of India as such spiritual head of the Shia Imami Ismailis as alleged in para 2 of the plaint?

No.

5. Whether the said allowance of Rs. 3,000 was not received by the first Aga Khan for his services to the British Government in or about the Christian years 1843 - 44?

Yes.

6. Whether the said allowance to the first Aga Khan formed part of the entire estate of the first Aga Khan's own family as alleged in para 2 of the plaint?

No.

7. Whether the plaintiff has any rights in the presents and offerings or in the investments now representing the same as claimed in para 2 of the plaint?

No.

8. Whether the plaintiff has any rights in the said allowance from Government or in the investments now representing the same as claimed in para 2 of the plaint?

No.

9. Whether the first Aga Khan in the year 1845 possessed extensive estates in Persia as alleged in para 3 of the plaint?

No.

10. Whether the first Aga Khan after 1845 purchased any estate in British India with the aid of monies derived from the income of his extensive estates in Persia as alleged in para 3 of the plaint?

No.

11. Whether the 1st defendant ever got possession or is now in possession of any estates in Persia which belonged to the first Aga Khan as aforesaid?

No.

12. Whether the second Aga Khan continued the same policy as alleged in para 4 of the plaint?

No.

13. Whether the second Aga Khan ever bought any properties in British India with the aid of the income of the first Aga Khan's extensive estates in Persia as alleged in para 4 of the plaint?

No.

14. Whether the 1st defendant ever got possession of or is now in possession of any properties such as are mentioned in the 13th issue?

No.

15. Whether the 1st defendant as titular head of the first Aga Khan's own family receives offerings and presents and an allowance from Government as alleged in para 4 of the plaint?

No.

16. Whether the offerings and presents that the 1st defendant receives from his followers are not given to and received by him as the Hazar Imam and in consequence of the veneration and devotion of the Shia Imami Ismailis to his person?

Yes.

17. Whether the offerings and presents mentioned in the last issue are not given to and received by him as his own absolute private property?

Yes.

18. Whether the allowance of Rs. 1,000 per month received by him from the British Government is not given to him in recognition of the first Aga Khan's services to the British Government for his own use absolutely?

Yes.

realpatidar.com

19. Whether the allowance received by the second Aga Khan from the British Government was not his own absolute property and whether the same was not granted to the second Aga Khan in recognition of the services aforesaid of the first Aga Khan?

Yes.

20. Whether the 1st defendant as titular head of the family holds and manages immoveable property and cash, securities, outstandings, and other moveable property of the estimate value of Rs. 2,00,00,000 (two crores) as alleged in para 4 of the plaint?

No.

21. Whether the 1st defendant holds and manages property of the first Aga Khan's own family in the different places mentioned in para 4 of the plaint or any of them?

No.

22. Whether the 1st defendant has from time to time sold off several properties belonging to the first Aga Khan's own family and invested the sale proceeds and other monies of the said family in the purchase of diverse properties now standing in the names of the 1st defendant's nominees as alleged in para 4 of the plaint, and in particular whether the 1st defendant has sold the property mentioned in answer to interrogatory No. 15 administered to the plaintiff in this suit?

No.

23. Whether the 1st defendant has purchased the properties in the name of nominees as stated by the plaintiff in her answer to the 16th interrogatory administered to her in this suit?

No.

24. Whether 1st defendant is in possession of the properties mentioned in the plaintiff's answer to the said interrogatory?

No.

25. Whether the properties mentioned in the plaintiff's answer to said 15th and 16th interrogatories form part of the estate of the 1st Aga Khan's own family as alleged in para 4 of the plaint?

No.

26. Whether during the lifetime of the first Aga Khan every male member of the family on attaining majority and every female member thereof on attaining majority or marrying resided rent-free in some house or houses pertaining to the first Aga Khan's own family and through the titular head and manager for the time being of the said family and out of the funds of the said family estate received monthly allowances and the salaries of servants and wedding presents in the event of marriage and was provided with servants, carriages, horses, furniture and other requisites and comforts by virtue of the fact that they were heirs and heiresses jointly entitled as of indefeasible rights under the Mahomedan law of inheritance to definite parts or shares in the said family estate as alleged in paras 13 and 14 of

the plaint?

realpatidar.com

No.

27. Whether the claim based on the said allegation set out in the last issue is not bad in law on the face of it?

Yes. Allegation as heirs and heiresses jointly absurd.

28. Whether since the death of the first Aga Khan every male member of the family on attaining majority and every female member thereof on attaining majority or marrying has resided rent-free in some house or houses pertaining to the said family estate and through the titular head or manager for the time being of the said family and out of the funds of the said family estate has received personal monthly allowances and the salaries of servants and wedding presents in the event of marriage and was provided with food, servants, carriages, horses, furniture and other requisites by virtue of the fact that they were heirs and heiresses jointly entitled as of indefeasible right under the Mahomedan law of inheritance to definite parts or shares of and in the family estate as alleged in paras 13 and 14 of the plaint?

No.

29. Whether the residence, allowances, requisites and comforts mentioned in paras 13, 14, and 15 of the plaint were given to and received by the recipients thereof as a portion or on account of what they were entitled to receive as heirs according to their respective parts or shares under the Mahomedan law of inheritance of and in the family estate as alleged in para 15 of the plaint?

No.

30. Whether it is not the fact that the first Aga Khan during his lifetime in Bombay provided residence for, gave allowances to, and made provision for the maintenance and comfort of his own descendants, the husbands of his descendants, relations near and remote, or some of them and also for the families of persons not related to him by blood under the circumstances set forth in paras 51 and 52 of the defendant's written statement as a matter of bounty only?

Yes.

31. Whether the second Aga Khan did not continue the practice of his father in providing for and maintaining a number of relatives near and remote and stranger in blood to him as a matter of bounty only as alleged in para 52 of the first defendant's written statement?

Yes.

32. Whether the first defendant and the 3rd defendant for him during his minority did not continue the said practice as a matter of bounty only as alleged in para 52 of the 1st defendant's written statement?

Yes.

33. Whether the 1st defendant is not entitled to vary, decrease, increase or altogether stop his bounty aforesaid to any person to whom the same has been

accorded whenever he chooses?

realpatidar.com
Yes.

34. Whether the claim which is said never to have been questioned in para 16 of the plaint was ever made before the plaintiff made the same in the suit or shortly prior thereto?

No.

35. Whether there was any joint succession to the estate of the first Aga Khan as alleged in para 18 of the plaint?

No.

36. Whether the second Aga Khan managed the estate left by the said first Aga Khan till his death as alleged in part 18 of the plaint?

No. Part only, Jungi and Akbar took part.

37. Whether the facts in connection with what happened to the first Aga Khan's estate on his death are not correctly set forth in paras 24, 25, 26 and 27 of the 1st defendant's written statement?

Yes.

38. Whether Aga Jungi Shah by virtue of his right as an heir since he came of age in the lifetime of the first Aga Khan occupied a house at Poona, Connaught Road, and a house at Love Lane, Bombay, and received from the family estate about Rs.800 a month as personal allowance together with salaries of servants, carriages, horses, food, furniture and other requisites and comforts and his funeral expenses as alleged in para 19 of the plaint?

No.

39. Whether it is not the fact that the said Jungi Shah occupied the said immoveable properties which belonged to the first Aga Khan in the first Aga Khan's lifetime by the permission of the first Aga Khan?

Yes.

40. Whether it is not the fact that the monthly allowance paid to and other benefits enjoyed by the said Jungi Shah during the first Aga Khan's lifetime were enjoyed by him from the bounty of the first Aga Khan and not otherwise?

Yes.

41. Whether the money payments, allowances and requisites and comforts which Jungi Shah enjoyed were not continued to him by the second Aga Khan and afterwards by the 1st defendant's mother during the 1st defendant's minority and by the defendant since he attained majority and were enjoyed by the said Jungi Shah as a matter of bounty only and not otherwise?

Yes.

realpatidar.com

42. Whether Zenalabadeen Shah received monthly personal allowance besides

residence, servants, salaries, horses, carriages, food and wedding expenses and presents and his personal expenses by virtue of his right as an heir as alleged in para 20 of the plaint.

No.

43. Whether whatever Zenalabadeen Shah received as alleged in para 20 of the plaint was not received by him as a matter of bounty only and not otherwise?

Yes.

44. Whether on the death of the first Aga Khan his three widows, three sons, and three daughters and their issues continued to live together as an undivided joint family as alleged in para 23 of the plaint?

No.

45. Whether the said three widows, three sons, and three daughters and their issues were jointly in enjoyment of the entire family estate according to their respective undivided shares therein as alleged in para 23 of the plaint and whether after the death of any of the widows, sons and daughters, his or her heirs continued to live as an undivided joint family with the survivor and their issues and jointly to enjoy the family estate as alleged in para 23 of the plaint?

No.

46. Whether the allegations made in para 23 of plaint are not wholly inconsistent with the allegations in the plaint made in the previous paras thereof and in para 24 of the plaint?

Yes.

47. Whether the 1st defendant's mother during the 1st defendant's minority managed the joint family estate from 17th August 1885 till the year 1893 as alleged in para 28 of the plaint?

No.

48. Whether the 1st defendant's mother did not manage the estate she managed as manager for the 1st defendant and on his account exclusively?

Yes.

49. Whether the plaintiff is entitled to 7/144 share in the entire property in the possession of the 1st defendant as alleged in para 34 of the plaint?

No.

50. Whether the transaction evidenced by the Indenture of the 11th day of September 1901 mentioned in para 36 of the plaint is not a *bona fide* valid transaction in the nature of a family arrangement and binding on the plaintiff?

Yes.

51. Whether the 5th defendant as administrator of the estate of Jungi Shah had legally no right to execute the said Indenture of the 11th day of September 1901 as

alleged in para 39 of the plaint?

realpatidar.com

Section 90 of the Probate and Administration Act does not apply - not giving up anything.

52. Whether the transaction evidenced by the said Indenture of the 11th day of September 1901 was a sham transaction and never intended to be acted upon as alleged in para 39 of the plaint?

No.

53. Whether the 1st defendant has not paid in cash to the 5th defendant Rs. 40,000 mentioned in the said release of the 11th day of September 1901, and executed a conveyance to the 5th defendant of properties worth one lakh of rupees mentioned in the said Indenture?

Yes.

54. Whether the plaintiff has received any portion of the said Rs. 40,000 from the 5th defendant?

Yes, Rs. 10,000.

55. Whether the transaction evidenced by the said Indenture of the 11th day of September 1901 and the said Indenture was collusive and fraudulent as alleged in para 39 of the plaint?

No.

56. Whether the application for Letters of Administration to the estate of Jungi Shah and the execution and registration of the said Indenture of the 11th day of September 1901 were constituent parts of a scheme conceived and carried out by the 1st defendant in collusion with the 5th defendant with the object of fraudulently depriving the plaintiff and other members of the family of their rights as joint heirs and heiresses and co-sharers in the said family estate under Mahomedan law as alleged in para 44 of the plaint?

No.

57. Whether the recitals in the said Indenture of the 11th day of September 1901 challenged by para 43 of the plaint were not true in fact and in law and if not correct were not *bona fide* believed to be true and correct by the parties to the said Indenture or in the alternative were believed to be such as could not be proved to be not true and incorrect.

Yes.

58. Whether the recitals challenged in para 43 of the plaint and those mentioned in para 44 of the plaint are false and were concoctions of the 1st defendant and the 5th defendant acting in collusion as alleged in para 44 of the plaint?

No.

59. Whether the property described in Schedule B to the said Indenture of the 11th day of September 1901 belonged to the separate estate of Aga Jungi Shah and

never belonged to the estate of the first Aga Khan as alleged in para 45 of the
plaint?
realpatidar.com

No.

60. Whether the said property described in Schedule B to the said Indenture did not belong to the first Aga Khan at the time of his death?

Yes.

61. Whether there were not two other properties, one at Mount Road and the other at Baboola Tank known as the Hamamkhana in the possession of Jungi Shah's heirs or some of them, portions of the first Aga Khan's estate which were not mentioned in the said Indenture for good reasons, but the existence of which was well known to the parties to the said Indenture?

Yes.

62. Whether the property at Mount Road was purchased by the said Jungi Shah out of his own savings and income as alleged by the plaintiff in this suit?

No.

63. Whether the Hamamkhana property was built by the said Jungi Shah with his own money as alleged by the plaintiff in this suit?

No.

64. Whether the share of Jungi Shah's estate in the estate which was surrendered by the said release was worth more than 40 lakhs of rupees as alleged in para 37 of the plaint?

No.

65. Whether the 5th defendant as administrator aforesaid did not get more by the arrangement evidenced by the said Indenture than he was at all likely to get by filing a suit against the 1st defendant?

Yes.

66. Whether the arrangement evidenced by the said Indenture was not a very wise and beneficial arrangement in the interests of those entitled beneficially to the estate of Jungi Shah and whether the parties beneficially interested therein to the extent of 25/32nds thereof do not approve of and support the said arrangement?

Yes.

67. Whether the said Jungi Shah and his estate and the persons beneficially interested in the estate have not as a matter of fact received, if the allegations in the plaint are correct, much more than what Jungi Shah's estate entitled to as a sharer in the first Aga Khan's estate?

Yes.

68. Whether the claim of Jungi Shah's estate against the said estate of the first
Aga Khan was not barred by limitation at the date of the said Indenture?
realpatidar.com

Yes.

realpatidar.com

69. Whether the plaintiff's suit to set aside the said Indenture of the 11th day of September 1901 and to have it declared not binding on her is not barred by limitation?

Yes, as far as Shamsudin is concerned; not as far as defendant 1 is concerned.

70. Whether in any event the plaintiff is entitled to maintain this suit so far as it is based on her being one of the heirs of Jungi Shah as long as the said release is not set aside?

No.

71. Whether even if the release is set aside the plaintiff can maintain this suit against the 1st defendant to recover any property as one of the heirs of Jungi Shah?

No.

72. Whether when the arrangement evidenced by the Indenture of the 11th day of September 1901 was come to property was not included in the list of properties treated as the first Aga Khan's estate which in fact did not belong to the said estate and in which the said Jungi Shah's estate had no share?

Yes. Karachi property and Ali Shah's.

73. Whether on the occasion aforesaid property was not included in the list of properties treated as the first Aga Khan's estate which although belonging to that estate had had large sums expended in buildings upon them and otherwise by the second Aga Khan and the 1st defendant without any allowance being made for such expenditure?

Yes.

74. Whether if the said Indenture is set aside and the estate of the first Aga Khan partitioned amongst his heirs such property which did not in fact belong to his estate should not be excluded and due allowance made for the expenditure upon such property by the second Aga Khan and the 1st defendant as well as that made upon property mentioned in issue 37?

Yes, in that event.

75. Whether if the said Indenture is set aside and the estate of the first Aga Khan partitioned amongst his heirs the three properties appropriated by Jungi Shah after the death of the first Aga Khan should not be brought into hotchpotch on such partition as also the property conveyed by the 1st defendant to the 5th defendant under the said Indenture, and whether in such event the estate of Jungi Shah is not bound to return to the 1st defendant the sum of Rs. 40,000 paid under the release to the administrator of that estate, together with interest thereon at 9 per cent, per annum or such other rate of interest as may be just at annual rents from the date of the said Indenture?

Yes.

realpatidar.com

76. Whether the 5th defendant has continued since the 11th September 1901 to receive payment and benefits mentioned in para 38 of the plaint as one of the heirs entitled under the Mahomedan law entitled to share in the family estate as alleged in the said 38th para?

No.

77. Whether the payments and benefits received by the 5th defendant from the 1st defendant as alleged in para 38 of the plaint have not been paid, conferred and received from the bounty of the 1st defendant and not otherwise?

Yes.

78. Whether the contentions mentioned in para 42 of the plaint are sustainable?

No.

79. Whether the Indenture of the 26th day of September 1901 mentioned in para 46 of the plaint was not a *bona fide* valid transaction in the nature of a family arrangement and whether the recitals in the said Indenture alleged to be false are not true recitals?

Yes.

80. Whether the circumstances under which the said Indenture of the 26th day of September 1901 was entered into or the allegations made in para 50 of the plaint have any relevancy in this suit, and if they have any relevancy what is it and what are the circumstances under which the said Indenture was executed and is the plaintiff's information and belief mentioned in para 50 of the plaint correct?

No.

81. Whether the plaintiff from the year 1880 received Rs. 375 per month as personal allowance (1) from the 1st Aga Khan, (2) from the 2nd Aga Khan, (3) from the 1st defendant as alleged in para 51 of the plaint?

No. It was her husband who received it.

82. Whether the salaries of the plaintiff's syces and servants were paid and the other benefits mentioned in the said para. 51 conferred on her since 1880 as alleged in para 51 of the plaint?

No.

83. Whether it is not the fact that no personal allowance was ever made to the plaintiff at any time and that the residence and other benefits which she has enjoyed were conferred on her said husband out of the bounty of the first and second Aga Khans and that she jointly enjoyed them with him as his wife up to the time of the death of her husband?

Yes.

84. Whether it is not the fact that the food and other requisites supplied to the plaintiff after the death of her husband were given to her by the 1st defendant out of bounty?

Yes.

realpatidar.com

85. Whether the matters alleged in paras 52 and 53 of the plaint if true give the plaintiff any cause of action against the 1st defendant?

No.

86. Whether the first Aga Khan left a will which has been suppressed by the 1st defendant as alleged in para 55 of the plaint to have been stated to the plaintiff by the defendants 9 to 4?

No.

87. Whether the 1st defendant with a view to defraud other members of the family has placed large portions of the family estate in the names of strangers and concealed other portions of great value as alleged in para 56 of the plaint?

No.

88. Whether the 1st defendant has drawn vast sums of money from the family estate quite out of proportion to his share in the family estate and far in excess of his requirements and has misappropriated and expended the same just as he liked and speculated with the same and applied the same in discharging his own personal debts and for special purposes for which he had no right to call on the family purse including betting heavily and recklessly on the turf as alleged in para 56 of the plaint?

No evidence. Stood over till the other issues had been decided.

89. Whether the 1st defendant has alienated portions of the family estate for his own benefit and caused heavy loss to the estate by gross and reckless mismanagement, extravagance and waste and not recovering property he ought to have recovered as alleged in para 56 of the plaint?

No. Evidence stood over.

90. Whether the plaintiff ought to be allowed to give any evidence or cross-examine any witness on issues 88 and 89 until she has proved that the property the 1st defendant has been dealing with is not his own and that the plaintiff has some interest therein?

Stood over.

91. Whether the trial of issues 88 and 89 should not be postponed until after the other issues in the case have been determined?

Yes.

92. Whether the plaintiff is entitled to the sum of Rs. 9,000 and interest claimed in para 8 of the plaint or any part thereof?

No.

93. Whether the plaintiff is entitled to what she claims in para 59 of the plaint?

realpatidar.com

No.

94. Whether the 1st defendant is a "titular head" of a family in the sense it is believed it is alleged in the plaint, viz., that of a mere agent of the family to receive monies on their behalf?

No.

95. Whether the second Aga Khan did not leave property of his own acquisition to which his heirs are entitled?

Yes.

96. Whether the prayer C to the plaint is supported or justified by any allegations made in the plaint and if not whether the plaintiff can in any event obtain a decree in terms of the said prayer?

No.

97. Whether the prayer C to the plaint ought not to be struck out or altogether disregarded?

Not necessary.

98. Whether the expenditure for the benefit of relations near and remote and for strangers in blood has not as a matter of fact been paid out of the voluntary offerings made to the Aga Khan for the time being as alleged in para 53 of the 1st defendant's written statements?

Yes.

99. Whether the allegations made in paras 53, 54, and 56 of the 1st defendant's written statement are not true?

100. Whether the lineal and collateral relatives of the first Aga Khan are all shown in the Genealogical Table annexed to the plaint and marked A?

No.

101. Whether the persons named in list No. 1 to the 1st defendant's written statement are not persons who by reason of relationship to the first Aga Khan by blood or marriages should have been interested in the said table Ex.A to the plaint?

Yes.

102. Whether the counter claims of the 1st defendant set forth in para 56 of the 1st defendant's written statement ought not to be decreed in favour of the 1st defendant in the events contemplated in that para?

Not necessary.

103. Whether this Court has any jurisdiction to determine the title to or to partition or otherwise pass any decree affecting immoveable property outside the local limits of the jurisdiction of this Court, viz., the Town and Island Bombay?

Not necessary.

realpatidar.com

104. Whether the father of defendants 7 and 8, Akbar Shah, did not appropriate to his own exclusive use to the entire exclusion of the other heirs of the 1st Aga Khan the immoveable properties in para 5 of the written statement of defendant 7?

Yes.

105. Whether Akbar Shah and his mother did not appropriate to their exclusive uses the moveable property mentioned in the said para of the 7th defendant's written statement?

Yes.

106. Whether Akbar Shah did not deal with the said immoveable properties as his own?

Yes.

107. Whether the claims of the heirs of the first Aga Khan and those claiming under them are not barred by limitation in respect of the said properties in para 5 of the defendant 7th's written statement?

Yes.

108. Whether the offerings received from time to time by the successive Aga Khans beginning from Shah Hassan Ali were not and are not received by them for and on behalf of and benefit of all the members of the family of Shah Hassan Ali and for their individual benefit?

No.

109. Whether the whole of the said family is not held sacred by the devotees as the family that supplies the Imam and whether the Aga Khan for the time being is not the "titular head" and representative of the family?

No.

110. Whether all the members of the family of Shah Hassan Ali including defendants 9 to 14 are not jointly entitled to the offerings received from time to time and the properties acquired by means of such offerings?

No.

111. Whether instead of dividing the offerings and the properties among the persons so entitled to them a custom to the effect mentioned in para 3 of 9-14 defendants' written statement has not grown up in the family?

No.

112. Whether the rights and interests of defendants 9-14 in the properties and offerings, subject of this suit, should not be ascertained and declared?

No. Their rights are none.

113. Whether the payment and provision to and for defendants 9-14 in future of the residence, allowances, etc. in accordance with the custom as aforesaid should not be secured and the arrears of such allowances be decreed?

No.

realpatidar.com

114. Whether in the alternative defendants 9-14 should not be given their shares on the basis of former allowances and provisions in the said properties and offerings?

No.

115. Whether this defendant (No. 2) is entitled to share in the properties and offerings, the subject-matter of this suit?

No.

116. Whether defendant 2 has always during the life of Hassan Ali as well as since his death been receiving as of right from the family estate and offerings, allowances aggregating in all to Rs. 200 per month besides salaries of servants, food, horses, carriages and other comforts?

No. Not as of right, whatever was received by her was received by way of grace and bounty.

117. Whether in any event she is not entitled to have the said allowances and other requisites secured to her for the future during her life?

No.

118. General issue.

119. Whether defendant 2 is not entitled to a share in the properties left by the first Aga Khan as one of his heirs?

Not necessary in this suit?

120. Whether in the event of plaintiff failing in this suit in her claim to share in the first Aga Khan's estate issue 119 can be determined in this suit?

Not necessary.

121. If it can, whether defendant 2's claim as one of the first Aga Khan's heirs is not barred by limitation.

Not necessary.

122. Whether as a matter of fact defendant 2 has not received since the death of the first Aga Khan far more than her share according to Mahomedan law in the said estate come to 1st defendant's hands?

Not necessary.

123. Whether defendant 2 (in the event aforesaid) has any claim as against defendant 1 in respect of the property of the first Aga Khan which never came into his possession?

No.

realpatidar.com

124. Whether defendant 2 can claim against defendant 1 any interest she might

have had in the properties moveable and immoveable of the first Aga Khan's estate taken possession of by Akbar Shah and Jungi Shah?

No.

125. Whether plaintiff is entitled to partition of the Khoja burial ground?

No.

126. Whether the Hasanabad Mausoleum and the vaults underneath and the precincts thereof are not the private property of the heirs of Ali Shah?

Yes. See H.33, and D.H. 224 and 225.

127. Whether any member of the family is entitled as of right to be buried in Hasanabad.

No. Not without the permission of defendant 1.

128. Whether the Hasanabad Mausoleum and premises ought to be partitioned among the heirs of Hasan Ali or among the family of Hassan Ali?

No.

The result is that the suit is dismissed. This being so, it is obviously impossible that any relief could be granted to any of the defendants who support the plaintiff's case even if they were entitled thereto.

I now deal with cost of this suit. I am of opinion that separate sets of costs should be allowed (a) to each of the defendants 1, 3, and 5 respectively, and (b) one separate set to defendants (4 and 6) and (7 and 8) jointly. The persons liable to pay these costs are plaintiff and defendants 2 and 9 and 10. I do not think I should make defendants 11 and 12 to 14 liable for them or any part of them. Costs are pressed for against defendant 2. The above costs, which of course will include costs reserved if any and the costs of the commissions including the costs of the attendance of Mr. Moos throughout, will be payable by the defendants' above mentioned jointly and severally. Whether in the event of defendant 5 not recovering his costs, he can recover them from Jungi Shah's estate is a question I cannot decide in this case.

I cannot conclude this judgment without expressing the admiration I felt during the course of it at the manner in which it was conducted by Mr. Inverarity who, in spite of pain and bad health during nearly the whole of it, did not miss a single point and displayed an astonishing grasp of the many details. In his conduct of the case he was most skilfully supported by Mr. Moos, whose cross-examination of the plaintiff's witnesses on commission and examination of the defendant's witnesses has been a striking feature of the case, and in my opinion he richly deserved the handsome compliment which Mr. Inverarity paid him during his address in reply.

In this judgment I have tried to avoid saying a word which may enhance feelings of religious animosity in the community or hatred among the members of the family, and I trust that the result of this case may be that gradually any feelings of such a character may disappear from the minds of the members of the family as well as from those of this large and important community.

Attorneys for the plaintiff and defendant 2 and defendants 9 to 14: Messrs. Edgelow Gulabchand & Wadia.

Attorneys for defendant 1 and others: Messrs. Payne & Co.

TRIMBAK MADHAV TILAK

v.

NARAYAN HARI LELE*

Indian Trusts Act (11 of 1882), Sec. 34 - Trustee

Power to refer a question for opinion of the Court

Appeal from the opinion - Executor cannot refer -

Administration suit is the only remedy available to him

No appeal lies from an opinion expressed by the Court under the provisions of s.34 of the Indian Trusts Act, 1882.

An executor, who has not become a trustee by assenting to the legacies, cannot claim the advantages provided for trustees by s.34 of the Act. His remedy, if he feels any doubt as to the manner in which he should administer the estate come to his hands, is to file an administration suit.

ONE Vishnu Tilak died on the 25th February 1903, having previously made a will on the 25th April 1900. Of this will, Hari Narayan Lele and Ganesh Narayan Khare were appointed executors, and Lakshman Mahadev was a residuary legatee. He also bequeathed Rs. 4000 to his wife Yamunabai and Rs. 2000 to be spent on his daughter Varubai's marriage.

Hari Narayan Lele obtained probate of this will on the 29th July 1904. In carrying out the testator's instructions, Lele found some difficulties, to solve which he moved the District Court at Poona under s. 34 of the Indian Trusts Act 1882.

The questions that were submitted for opinion were as follow:-

1. Whether Yamunabai is entitled to receive Rs. 4000 out of the estate mentioned in the will on the ground that she recovered Rs. 3900 on a life insurance obtained by the deceased and assigned to her.

2. Whether as Varubai's marriage has already been effected at a cost of Rs. 800 she is entitled to receive Rs. 1200 more.

* Civil Extraordinary Application Judge of Poona, in

No. 72 of 1909, against the Miscellaneous Application

decision of C.A. Kinkaid, Esq. No. 10 of 1908.

District.

realpatidar.com